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In The

Supreme Court of the United States

October Term, 1997

CAROLYN PROPERTIES I, Florida general partnership; CAROLYN PROPERTIES, INC., a Florida corporation; JOIVECA CORPORATION, a Florida corporation; JLP HOLDINGS, INC., a Florida corporation; TK HOLDINGS, INC., a Florida corporation; HHC MIAMI, INC., a Florida corporation; and UNIVERSAL CONSULTANTS, LTD., CO., a Florida corporation,

Petitioners,

vs.

THE MITSUI TRUST & BANKING CO., LTD., a foreign corporation and KAJIMA INTERNATIONAL, INC., a foreign corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Bank Holding Company Act, 12 U.S.C. § 1972, require a borrower to prove that its lender used "force" or "coercion"?

Does a bank's sworn admission that it "required" its borrower to use a particular contractor with whom the bank shared extensive financial ties preclude, as a matter of law, summary judgment under the Bank Holding Company Act?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption of the case.

Pursuant to Rule 29.6, the following companies are affiliates of the petitioner corporations:

HHC Miami, Inc. is a subsidiary of Highness Kosan, Ltd., and Universal Consultants, Ltd., Co., is a subsidiary of Universal Consultants Co., Ltd.

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Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not published. It can be found at App. A.

The opinion of the district court is not published. It can be found at App. D and App. C (Order Clarifying Final Summary Judgment).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("the Eleventh Circuit") was entered on January 21, 1998. The Eleventh Circuit denied Carolyn's petition for rehearing and suggestion of rehearing *en banc* on March 17, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTE AT ISSUE

Pursuant to Rule 14(f), the text of the Bank Holding Company, 12 U.S.C. § 1972, is set forth in App. K.

STATEMENT OF THE CASE

A. Procedural Background

Petitioners (collectively, "Carolyn") applied for a construction loan from The Mitsui Trust & Banking Co., Ltd.

("Mitsui"). Carolyn's application included its preliminary intention to engage low-bidder Kajima International, Inc., ("Kajima") to build a five-star hotel on Miami Beach. Kajima's bid was $17.8 million. On January 11, 1990, Mitsui committed in writing to lend Carolyn $27 million.

Shortly before the scheduled funding, Mitsui's vice president reviewed the project and determined, in writing, that $18.0 million was a "high, but fair" bid. But within days of scheduled funding, Kajima abruptly demanded $26.8 million to build the hotel. Kajima threatened Carolyn that Mitsui would not fund the loan unless Kajima were the contractor.

Kajima predicted accurately: Mitsui rejected Carolyn's effort to use lower-priced Turner Construction Company. Mitsui declared that "American contractors are not qualified," and told Carolyn: "You're either going to build this hotel with Kajima, or you're not going to build it." Despite Turner's proposal to construct the hotel for approximately $21 million, because Carolyn would not employ Kajima, Mitsui dishonored and terminated its commitment.

Carolyn later unearthed the facts, previously unknown to Carolyn, that Mitsui and Kajima are intertwined by stock ownership and other financial arrangements. Carolyn also learned after it lost its loan that Mitsui was trying to take its relationship with the Kajima Group "to a deeper level" (Mitsui's own words, as used in an internal memorandum).

Carolyn sued. Mitsui prevailed on summary judgment for the stated reason that Carolyn had initially selected Kajima, and Mitsui therefore could not be held to have coerced its borrower to use a particular contractor in violation of the BHCA. The Eleventh Circuit concluded that the district court's sole basis for dismissal was incorrect, but affirmed on grounds stated to

be alternative but which rest entirely on its conclusion that the BHCA requires proof of "force" or "coercion."

Carolyn asserts six claims against Mitsui: (1) violation of the Bank Holding Company Act, 12 U.S.C. § 1972; (2) breach of contract; (3) unjust enrichment; (4) promissory estoppel; (5) fraudulent inducement; and (6) fraudulent conspiracy. Carolyn asserts five claims against Kajima: (1) breach of contract; (2) promissory estoppel; (3) fraudulent inducement; (4) fraudulent conspiracy; and (5) tortious interference. Both defendants filed counterclaims.

On defendants' motions for summary judgment, the Magistrate Judge wrote a 36-page June 28, 1994, Report and Recommendation recommending that each motion be denied in part. (App. I).

On August 23, 1994, the district court affirmed the Report, denying Mitsui's motion for summary judgment on the Bank Holding Company Act, contract, and unjust enrichment claims, but granting Mitsui's motion on fraudulent inducement, fraudulent conspiracy, and promissory estoppel. (App. H). The court denied Kajima summary judgment on the breach of contract and tortious interference claims, but granted Kajima's motion on fraudulent inducement, fraudulent conspiracy, and promissory estoppel. *Id.*

Seven months later, Mitsui and Kajima again moved for summary judgment. On October 25, 1995, the Magistrate Judge issued another Report (18 pages), concluding that all of Defendants' summary judgment motions should be denied in their entirety. (App. F).

On February 29, 1996, for the stated reason that Mitsui's later requirement that Carolyn use Kajima was excused by

Carolyn's preliminary selection of that proposed contractor, the district court rejected the Magistrate Judge's recommendation, issued a six-page opinion and "Final Summary Judgment," and dismissed all of Carolyn's claims with prejudice. (App. E). On April 4, 1996, the court granted Carolyn's motion for Rule 54(b) certification. (App. B).

On January 21, 1998, the Eleventh Circuit, in an unpublished opinion, affirmed the final judgment, for reasons not relied upon by the district court. (App. A). On March 17, 1998, also unpublished, the Eleventh Circuit denied rehearing and rehearing *en banc*. (App. J).

B. Statement of the Facts

The Eleventh Circuit held below that "Mitsui did not tie the loan to Carolyn's use of [Kajima]." (App. A. at 14a). The facts bearing on this legal conclusion are set forth below.

Six general partners contributed land and capital to form Carolyn to develop a luxury hotel in Miami Beach, Florida. On January 11, 1990, Carolyn paid Mitsui $135,000 for Mitsui's New York branch's written commitment to lend Carolyn $27 million to build the hotel.

Before obtaining the loan from Mitsui, Carolyn had signed a "letter of intent" with general contractor Kajima to build the hotel. Carolyn selected Kajima based on its $17.8 million bid, the lowest among several contractors' bids. The letter of intent required Kajima to provide specific "pre-construction services" and to submit a guaranteed maximum price ("GMP") to build the hotel. Mitsui's loan officer testified he understood Kajima's letter of intent was not a final construction contract.

Periodically, Kajima submitted revised estimates; all were under $22.5 million. On August 28, 1990, Kajima presented a

GMP to build the hotel for $26.8 million, which exceeded Kajima's last estimate by approximately $4 million and its initial estimate (upon which it was awarded the project) by approximately $9 million. By this point, Carolyn had spent $1.2 million in cash on the project (excluding $3.5 million in land). When Carolyn recoiled at Kajima's radically increased estimate, Kajima's senior vice president threatened Carolyn's president that, should Carolyn choose not to use Kajima, Kajima would convince Mitsui to refuse to lend any money to Carolyn.

Kajima carried out its threat. One day after Kajima was told it would no longer be the contractor, Kajima's Sadahiro sent a fax to Mitsui's loan officer, Hirohisa Gotoda, "warning" Mitsui that Kajima was concerned about the reliability and accuracy of Turner's bid. Kajima also "warned" Mitsui that Turner might try to create change orders (*i.e.*, raise its prices) later. Kajima never told Carolyn it had sent this fax. Kajima's officials later admitted at depositions that they never had even seen — much less reviewed — Turner's bid.

Six days later, Carolyn called Mitsui's Gotoda to discuss the change in contractors. In a speakerphone conversation heard by three witnesses (including Carolyn's general counsel), Gotoda then told Carolyn: "You're either going to build this project with Kajima, or you're not going to build it." Gotoda pronounced that American contractors were "not qualified" to build the hotel, asserting that "only a Japanese contractor was capable of building the hotel." Nevertheless, Gotoda promised Carolyn that Mitsui and its independent construction consultants would review Turner's proposal and compare it to Kajima's. Mitsui also promised that it would seek approval from Tokyo headquarters to allow Carolyn to use Turner.

But a few days later, on September 26, 1990, Gotoda wrote Carolyn acknowledging that changing from Kajima raised a

"very sensitive issue" for Mitsui. Gotoda also wrote that Mitsui "may be able to proceed" with Turner but only if Carolyn agreed to new conditions that substantially increased the cost of the loan, including an additional $5 million letter of credit. During this litigation, Carolyn uncovered an internal Mitsui memorandum in which Mitsui's loan officer reported to Tokyo headquarters that, even if Carolyn agreed to the new conditions, "it doesn't mean we automatically commit the loan on those terms."

Gotoda later admitted under oath that although he had promised Carolyn he would request approval from Mitsui's Tokyo headquarters to replace Kajima with Turner, he failed to honor even that promise. Mitsui also later confessed it refused to allow its construction consultants to review the Turner proposal, or to compare the Kajima and Turner proposals. Mitsui vice president Petsef, who herself had just determined Kajima's *initial* $18 million bid was "high," admitted that she "refused" to review Turner's $20.0 million proposal "at all," dismissing it as a "waste of time."

On October 29, 1990, Gotoda informed Carolyn — for the first time — that Mitsui now claimed that the loan commitment had "expired" as of October 5, 1990. Gotoda admitted that, before October 29, 1990, he had never before told Carolyn that the loan commitment had "expired" 24 days earlier. Mitsui's officials later admitted at their depositions that Carolyn's use of Kajima as the contractor was in fact a "requirement" under the loan commitment.

After Mitsui terminated and dishonored the loan commitment, Carolyn first discovered that Mitsui and Kajima shared significant financial ties: (1) Just five weeks before Mitsui terminated the loan commitment, Mitsui and Kajima had entered into a $10 million guarantee, obligating Kajima to repay its

wholly owned subsidiary's $10 million loan from Mitsui; that guarantee granted Mitsui a **security interest** in all of Kajima's accounts held by Mitsui in the United States; (2) Mitsui owned approximately $280 million of stock in Kajima's parent, Kajima Corporation; Kajima Corporation owned approximately $250 million of stock in Mitsui; (3) Mitsui was financially indebted to Kajima for construction services Kajima was performing directly for Mitsui; and (4) Kajima and its affiliates were indebted to Mitsui for approximately $111 million.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CREATES AND REVEALS FUNDAMENTAL CONFLICT AMONG THE CIRCUITS CONCERNING THE MEANING AND BASIC ELEMENTS OF AN IMPORTANT FEDERAL STATUTE: WHETHER FEDERAL ANTITRUST REQUIREMENTS OF "FORCE" AND "COERCION" MUST BE APPLIED TO PREVENT ILLEGAL TIES BY BANKS UNDER THE BANK HOLDING COMPANY ACT.

This case warrants review because Courts of Appeal fundamentally disagree on the basic elements of the Bank Holding Company Act (the "BHCA"), an important federal banking statute. The square conflict among the Courts of Appeal should be resolved to eliminate the uncertainty in commercial loan transactions nationwide that has resulted from the conflict and to establish predictability in the law for lenders and borrowers.

Congress enacted the BHCA anti-tying provisions

> to prohibit anti-competitive practices which require bank customers to accept or provide some other

> service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire.

Senate Banking Committee Rep. No. 90-1084, 91st Cong., 2d Sess. (1970), *reprinted* in 1970 U.S. Code Cong. & Admin. News 5519, 5535.

The Eleventh Circuit's decision in this case, relying on its previous decision in *Integon Life Insur. Corp. v. Browning*, 989 F.2d 1143 (11th Cir. 1993), holds that the BHCA required Carolyn to prove that "Mitsui ***forced or coerced*** Carolyn into using [Kajima] as the general contractor as a condition to obtaining the loan." (App. A at 9a, emphasis added). The opinion below also expressly holds that Carolyn "has not demonstrated a genuine issue of material fact as to whether Carolyn was *forced or coerced* into using [Kajima] in order to receive Mitsui's loan." (App. A at 11a, emphasis added).

This holding **directly** conflicts with the Fifth Circuit's and Ninth Circuit's interpretation of the BHCA. Those circuits found no "force" or "coercion" elements of a BHCA claim. *See Dibidale of Louisiana v. American Bank Trust Co.*, 916 F.2d 300, 306-307 (5th Cir. 1990), *amended*, 941 F.2d 308 (5th Cir. 1991) (a borrower need not prove "force" or "coercion" to prevail under the BHCA, only the existence of a "condition" or "requirement"); *S&N Equipment Co. v. Casa Grande Cotton Finance Co.*, 97 F.3d 337, 346 n.18 (9th Cir. 1996) ("although some showing of coercion may be required under the Clayton Act and the Sherman Act, . . . it is not a requirement under the Bank Holding Company Act").[1]

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1. This Court has not yet had occasion to consider the conflict because no petitions for writs of certiorari were filed in *Dibidale*, *Integon*, or *S&N Equipment*.

The Eleventh Circuit in *Integon* recognized that its interpretation conflicted with the Fifth Circuit's *Dibidale* decision. The Court in *Integon* stated that: "**We are aware that this holding arguably puts us into conflict with the language used by the Fifth Circuit in *Dibidale***, 916 F.2d at 306 . . ." 989 F.2d at 1151 n.20. Further highlighting the disagreement on whether "force" or "coercion" are elements of a BHCA claim is the fact Judge Edith H. Jones authored a lengthy dissent in *Dibidale* on that issue.

The Eleventh Circuit's decision here also acknowledges the conflict with *Dibidale*. (*See* App. A at 9a n.13, "*But see Dibidale*. . . .") The conflict was dispositive of this case, because it is undisputed that Mitsui made the borrower's use of Kajima a "requirement" and "condition" of the loan — the bank's officers admitted this under oath, and Mitsui's internal correspondence corroborated this testimony. Therefore, it is simply wrong for the Eleventh Circuit to conclude that "Mitsui did not tie the loan to Carolyn's use of KII" (App. A at 14a). Mitsui admitted it did so. The conflict between the Eleventh Circuit's decision below and the Fifth Circuit's *Dibidale* decision is accentuated and sharpened by the fact that *Dibidale*, as here, involved a bank's insistence that the borrower use a particular general contractor with whom the bank shared a financial relationship.

The Eleventh Circuit here, following *Integon*, held that a plaintiff must establish two elements under the BHCA: "(1) that there were two products, a tied and tying product, and (2) that the buyer was in fact forced to buy the tied product to get the tying product." (App. A at 9a).[2]

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2. Mitsui never disputed that a loan and a general contractor are two separate products. Hence, the Eleventh Circuit's holding was premised solely on its conclusion that "force" is an element of the BHCA.

However, the court in *Dibidale* noted that:

> The "condition or requirement" language of section 1972 does not indicate whether a plaintiff has to prove that it was coerced — *i.e.*, forced — to accept a tying arrangement in connection with the loan, or whether merely proving the existence of the condition or requirement is sufficient to state a claim.

916 F.2d at 305.

The Fifth Circuit, citing the BHCA's legislative history, concluded that:

> To restrict the scope of [the "condition" or "requirement" language] to tying arrangements in which a seller is literally forced to purchase or provide a tied product or service in order to obtain credit would vitiate that section's intended role for, ***as Congress recognized, a tying arrangement may squelch competition whether coercive or not.***

916 F.2d at 306 (emphasis added). The Fifth Circuit concluded that the borrower:

> need only allege and offer adequate summary judgment proof upon which the trier-of-fact could find that the hiring of [the contractor] was in fact a *condition or requirement* of its securing the desired loan from [the bank].

941 F.2d at 309 (emphasis added).

The Ninth Circuit in *S&N Equipment* later agreed with *Dibidale*, expressly rejecting "coercion" as an element of a BHCA claim. 97 F.3d at 346 n.18.[3]

3. The Ninth Circuit in *S&N* quoted a specific sentence in *Dibidale* (Cont'd)

The Eleventh Circuit's interpretation of the statute[4] is incorrect for three principal reasons. First, the statute's express language requires no showing of "force" or "coercion." Rather, the BHCA makes it unlawful for a bank to extend credit, or vary the consideration of such credit, on the "condition" or "requirement" that the customer obtain from or provide to the bank additional credit, property, or service. The BHCA provides, in pertinent part:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the **condition** or **requirement** —
>
> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit or trust service;
>
> * * *
>
> (C) that the customer provide some additional credit, property, or service

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(Cont'd)
that the Fifth Circuit later withdrew and replaced with different language. *See S&N*, 97 F.3d at 346 n.18; *Dibidale*, 941 F.2d at 309. *S&N*'s conclusion that coercion is not an element of a BHCA claim did not rest on that one sentence — it was the square holding of *Dibidale*.

4. *Integon* involved a claim under the anti-tying provisions of the Homeowners' Loan Act ("HOLA"), 12 U.S.C. § 1464(q). The Eleventh Circuit found that HOLA is interpreted in a "manner generally comparable" to the anti-tying provisions under the Bank Holding Company Act. 989 F.2d at 1149-50.

> to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> * * *

(emphasis added).

Second, in enacting the BHCA, Congress expressly intended to capture non-coercive conduct by banks:

> [T]ie-ins may result from actual coercion by a seller *or* from a customer's realization that he stands a better chance of securing a scarce and important commodity (such as credit) by "volunteering" to accept [or provide] other products or services rather than seeking them in the competitive marketplace. *In either case, competition is adversely affected*, as customers no longer purchase a product or service on its own economic merit.

Conf. Rep. No. 1747, 91st Cong., 2d Sess., *reprinted* in 1970 U.S. Code Cong. & Admin. News 5561, 5569 (emphasis added).

And third, the Eleventh's Circuit adoption of an antitrust law's "force" and "coercion" standard[5] is erroneous because the BHCA and the Sherman Act differ in two critical respects: unlike

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5. *See* App. A at 9a. ("Therefore, in order to succeed on its BHCA claim Carolyn must prove that Mitsui forced or coerced Carolyn into using KII as the general contractor as a condition to obtaining the loan."); App. A at 5a-6a. ("The dispositive question of the appeal is whether a genuine issue of material fact exists with respect to Mitsui's *coercion* upon Carolyn to serve the relationship between Mitsui and KII . . .") (emphasis added).

the Sherman Act, the BHCA does *not* require proof of a bank's market power or the anticompetitive effect in the marketplace — both are presumed. As the court in *Dibidale* noted:

> central to [the] more stringent regulation of the banking industry was *Congress's decision to exclude from the bank anti-tying provisions the market share and anti-competitiveness requirements* which were the cornerstone of tying claims under the general antitrust statutes.

916 F.2d at 305 (Emphasis added). *See also Parsons Steel, Inc. v. First Alabama Bank*, 679 F.2d 242, 245 (11th Cir. 1982) (same).

The Sherman Act, unlike the BHCA, requires proof of force or coercion because of the Sherman Act's requirement that market power be proven. If the market-power element disappears — as Congress stated it does under the BHCA — the linked force and coercion elements disappear with it. As this Court stated in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 464, 112 S. Ct. 2072, 2080 (1992), a

> necessary feature of an illegal tying arrangement [is] appreciable economic power in the tying market. **Market power is the power "to force a purchaser** to do something that he would not do in a competitive market."

(quoting *Jefferson Parish Hosp. District No. 2 v. Hyde*, 466 U.S. 2, 14, 104 S. Ct. 1551, 1559, emphasis added). Therefore, only if "market power" is an element do force and coercion come into play. Because the BHCA contains no requirement of market power, the BHCA does not — and cannot — contain any "force" or "coercion" elements.

In support of its conclusion that Carolyn must prove "force" or "coercion," the Eleventh Circuit cited *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1410, 1414 (11th Cir. 1987) (*See* App. A at 9a n.14). This underscores the Eleventh Circuit's error: *Tic-X-Press* was a case decided under the *Sherman Act*, which requires proof of market power.

Integon's analysis is flawed. It contravenes express Congressional intent that non-coercive conduct by banks is prohibited by the BHCA. Indeed, *Integon*'s conclusion that "force" and "coercion" are elements of a BHCA claim found no support from any BHCA case. To the contrary, in addition to *Dibidale*, *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 59 (5th Cir. 1978), requires no demonstration of "force" or "coercion." *See* 584 F.2d at 59. ("It is sufficient to allege that the bank *required* a customer to do an act not related to nor usually provided in connection with a loan.") (Emphasis added). *Accord Parsons Steel, Inc. v. First Alabama Bank*, 679 F.2d 242 (11th Cir. 1982) (following *Swerdloff*).

Mitsui's officers admitted under oath that they did in fact "require" Carolyn to use Kajima, and that the use of Kajima was indeed a "condition" of the loan. Mitsui's September 26, 1990, letter directly corroborates these sworn admissions. In that letter, Mitsui states that it is changing the terms of the loan if Carolyn declined to use Kajima. The letter states that Mitsui is imposing two new conditions solely because Kajima had been replaced. But the BHCA makes that unlawful: a bank is prohibited from "vary[ing]" the consideration of credit on the condition or requirement that the customer obtain additional credit, property, or service from the bank. Mitsui's September 26, 1990, letter indisputably and materially increased Carolyn's cost of the loan if Carolyn tried to replace Kajima. Mitsui's letter, alone, constitutes a violation. It therefore was

incorrect as a matter of law for the Eleventh Circuit to conclude, on summary judgment, that no BHCA violation occurred.[6]

The Eleventh Circuit also misconstrued the BHCA by concluding that Mitsui had "justifications" for insisting on Kajima. (App. A at 11a-12a). Section 1972(1)(C) of the BHCA contains no "justification" defense. Sections 1972(1)(C) and (1)(A) differ in a material respect: Section 1(A) prohibits a lender from requiring a borrower to obtain some additional credit, property, or service from the lender "other than a loan, discount, deposit, or trust service." Section 1(C), in contrast, prohibits a lender from requiring a customer to provide some additional credit property, or service "*other than those related to and usually provided in connection with* a loan, discount, deposit, or trust service." Mitsui has never contended that the insistence on the use of a contractor in whom the bank has a substantial investment is an ordinary banking practice.

Mitsui could not require Carolyn to use Kajima. While Mitsui may have been permitted to insist on the use of a

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6. Moreover, even were the Eleventh Circuit correct that "force" and "coercion" are elements of a BHCA claim — which is not the case — the record clearly demonstrates Mitsui used such force. Aside from Mitsui's threat that it would not make the loan unless Kajima remained as the contractor, the record contains sworn admissions from Mitsui's officers that they wanted Kajima to serve as the contractor and that they made this perfectly clear to Carolyn.

Further, the Eleventh Circuit's holding is contrary to well-established law that "coercion" can be established by a formal agreement alone (*e.g.*, a loan commitment). *See Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 66 (4th Cir. 1970), *cert. denied*, 90 S. Ct. 918 (1970) ("the tying arrangement is no less invalid when it is written into a formal contract than when it is imposed by means of coercive or fraudulent practices"); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1328 (5th Cir. 1976) ("of course, in certain circumstances, the element of coercion can be established on the basis of a formal agreement").

contractor with whom it had no financial ties without violating the BHCA, Mitsui could not, as a matter of law, require Carolyn to use Kajima (or increase the cost of the loan were Kajima replaced). *Dibidale* is squarely on point. Moreover, under this Court's *Eastman Kodak* decision, summary judgment is prohibited where "factual questions exist . . . about the validity and sufficiency of each claimed justification." *Eastman Kodak*, 504 U.S. at 483, 112 S. Ct. at 2091.

Here, the record contains indisputable evidence showing that Mitsui wanted Kajima to remain as the contractor because of its entangled relationship and to enrich its $10 million loan guarantor, Kajima, with a $27 million construction project. Gotoda admitted he was actively seeking new business from Kajima just a month before Mitsui signed the loan commitment. Mitsui's senior vice president testified that Kajima was "the essential point" of the deal. Mitsui's October 19 and 26, 1990, internal reports to headquarters stated:

> We explained [to Carolyn] that appointment of [Kajima] as the general contractor is one of the loan terms indicated in the commitment letter, also it is an important factor for our company.

They also testified that the principal reason Mitsui terminated the loan commitment was Carolyn's decision not to use Kajima as the contractor. And, two weeks before Mitsui's September 26, 1990, letter imposing new conditions were Kajima replaced, Tokyo headquarters instructed the New York branch to "watch Kajima's business closely." This compelling evidence precludes summary judgment on Mitsui's "business justification" defense — even if such a defense existed under the BHCA. *See Eastman Kodak*, 504 U.S. at 484, 112 S. Ct. at 2091 ("there are other reasons to question [defendant's] proffered motive . . .").

The Eleventh Circuit's opinion contains a holding which purports to be alternative (that Carolyn did not have the ability

to fulfill certain loan terms), but which in reality rests entirely on its conclusion that the BHCA requires "force" or "coercion." But if the BHCA does not require force or coercion, that alternative holding cannot stand. First, the evidence demonstrates that Mitsui's required use of higher-priced Kajima caused Carolyn's alleged inability to close. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114-115 & n.9, 89 S. Ct. 1562, 1571-2 & n.9 (an antitrust violation need not be the sole cause of injury, only "a material cause of the injury"). Second, Mitsui's own banking expert admitted at his deposition (at two separate sessions) that Carolyn *did* in fact have the ability to close. (This evidence, alone, created a genuine issue of material fact on this point.) And third, Mitsui's requirement that Carolyn use Kajima occurred before Mitsui's termination of the loan and before Mitsui set a closing date.[7]

This Court should grant certiorari to review this issue of national importance and establish uniformity on the basic elements necessary to prove a violation of the BHCA.[8]

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7. Moreover, the Eleventh Circuit's opinion applied the incorrect standard on summary judgment. The opinion makes references such as "[t]he record is replete with evidence that . . .". (*See, e.g.*, App. A at 15a). Of course, that is the incorrect legal standard; Carolyn need only demonstrate that all of the evidence creates a genuine issue of material fact.

8. This Court should grant the petition not only as it applies to Mitsui, but to Kajima as well, because the lower court based its dismissal in part on its finding of no BHCA violation by Mitsui. (*See* App. A at 13a-14a). If this Court concludes the lower court erred in interpreting the BHCA — as Carolyn asserts in this petition — that ruling would vitiate the lower court's granting of summary judgment for Kajima.

CONCLUSION

For the above reasons, Petitioners respectfully request that this Court grant this petition for a writ of certiorari to resolve the square conflict among Courts of Appeal on the basic elements of a BHCA claim.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 21, 1998

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4484

D.C. Docket No. 92-2113-CIV-FERGUSON

CAROLYN PROPERTIES I, a Florida general partnership, CAROLYN PROPERTIES, INCORPORATED, a Florida corporation, JOIVECA CORPORATION, a Florida corporation, JLP HOLDINGS, INCORPORATED, a Florida corporation, TK HOLDINGS, INCORPORATED, a Florida corporation, UNIVERSAL CONSULTANTS, LTD., CO.,

Plaintiffs-Counter-
Defendants-Appellants,

HHC Miami, Inc.,

Plaintiff-Appellant.

versus

MITSUI TRUST & BANKING COMPANY LIMITED, a foreign corporation, KAJIMA INTERNATIONAL, INCORPORATED, a foreign corporation,

Defendants-Counter-
Claimants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 21, 1998)

Appendix A

Before CARNES, Circuit Judge, KRAVITCH and REAVLEY*, Senior Circuit Judges.

REAVLEY, Senior Circuit Judge:

Plaintiff-appellants, Carolyn Properties I ("Carolyn"), a Florida partnership, and its partners, the developers of a proposed hotel on Miami Beach, initiated this action for damages against the Mitsui Trust & Banking ("Mitsui"), the proposed lender for the hotel project, and Kajima International, Inc. ("KII"), a construction contractor which bid on the project. Carolyn appeals the district court's grant of summary judgment in favor of Mitsui and KII. Carolyn contends that the district court's interpretation of the anti-tying provisions of the Bank Holding Company Act ("BHCA") is erroneous as a matter of law, and that evidence exists creating genuine issues of material fact supporting Carolyn's claims against both Mitsui and KII. Although for reasons different than those stated by the district court, the district court's summary judgment dismissing Carolyn's claims, is AFFIRMED.[1]

I. BACKGROUND

Carolyn was a Florida general partnership formed for the purpose of constructing, developing, and operating a hotel in

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

1. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (stating that the decision of the lower court must be affirmed if the result is correct even though the lower court relied upon a wrong ground or gave a wrong reason), cited in *C.H. Robinson Co. v. Trust Co. Bank, N.A.*, 952 F.2d 1311, 1316 (11th Cir. 1992).

Appendix A

Miami Beach. The general partners of Carolyn were Carolyn Properties, Inc., Joiveca Corporation, JLP Holdings, Inc., TK Holdings, Inc., HHC Miami, Inc. ("HHC"), and Universal Consultants, Ltd., Co. ("Universal"). Each was a Florida corporation formed for the purpose of investing in the Miami hotel project and possessed only limited assets. Mitsui is a commercial bank organized under the laws of Japan with a branch office in New York City. KII is a California corporation engaged in the business of construction contracting.

On April 18, 1989, Carolyn and KII executed a Letter of Intent which provided that KII was to provide preconstruction services for construction of a proposed Japanese style hotel on Miami Beach in advance of a possible construction contract to be later entered into by these parties. Among other services, the Letter of Intent required KII to prepare an itemized "Guaranteed Maximum Price" contract ("GMP") for the construction of the hotel, based on virtually complete working drawings to be prepared by Carolyn's architects. The GMP was to include all direct and indirect construction costs with certain exceptions including "FF&E" (furniture, fixtures and equipment) items for the project. The Letter of Intent further provided that the contemplated construction contract between KII and Carolyn would not be binding on either party until approved and accepted in writing by both parties. The Letter of Intent provided that if Carolyn rejected a proposed contract with KII for the construction of the hotel, Carolyn would pay KII's costs for preconstruction services up to $100,000 and "hold KII harmless from any liability loss, costs, claims or expense including attorneys fees."

On January 11, 1990, Carolyn and Mitsui signed a commitment letter for financing of the hotel. Mitsui agreed to

loan $27 million to Carolyn subject to several conditions set forth in the commitment letter. Among other provisions, the commitment letter required that:

> Kajima International, Inc. (the "General Contractors") must provide a guaranteed maximum price contract (including a guaranteed maximum price for all FF&E costs) in form and substance satisfactory to Lender [Mitsui], and for a guaranteed maximum price acceptable to Lender and consistent with the approved Budget.

Among other conditions, the commitment letter also required two Japanese investors, HHC Miami, Inc. ("HHC") and Universal Consultants, Ltd. ("Universal"), to each contribute $2.5 million in equity; $3 million standby letter of credit; and that there be no adverse material change in Carolyn's financial condition prior to closing. The commitment letter provided for an expiration date of July 1, 1990. This expiration date was extended five times in writing with a final written extension date set for October 5, 1990.

Between January and August 1990, Kajima provided numerous cost estimates to Mitsui based on partially completed architectural drawings that the Carolyn's architects submitted. On several occasions, KII advised Carolyn in writing that cost estimates were exceeding Carolyn's budget of $18 million.

On August 28, 1990, KII presented a GMP of $26,857,525, including FF&E, based on 85% complete drawings for the hotel. On September 21, 1990, Carolyn advised XII that it would not be retained as the general contractor for the project. No construction contract was ever entered into between Carolyn and KII nor any other party.

Appendix A

On September 23, 1990, Carolyn advised Mitsui that Carolyn had terminated its relationship with KII and that KII would not be the general contractor for the hotel project. Carolyn further advised Mitsui that it intended to use Turner Construction Company who had submitted a cost estimate for the project.

On October 29, 1990, Mitsui advised Carolyn in writing that Carolyn had not complied with the terms of the commitment letter so that the commitment letter had expired on October 5, 1990. Carolyn did not arrange for any other financing and the hotel project is not currently underway.

On September 7, 1993, Carolyn filed suit against Mitsui and KII. Carolyn's operative complaint asserts numerous claims against Mitsui including a violation of the anti-tying-provision of the BHCA.[2] The complaint asserts several claims against KII including breach of contract and tortious interference with advantageous business relations. Mitsui counterclaimed for breach of contract, and KII counterclaimed for breach of contract, quantum meruit and account stated.

On February 29, 1996, the district court rejected the Magistrate's conclusion that all of KII's and Mitsui's summary judgment motions should be denied in their entirety, granted their motions for summary judgment, and issued a Final Summary Judgment dismissing all of Carolyn's claims with prejudice. On April 4, 1996, the district court amended and clarified its order, pursuant to federal Rules of Civil Procedure 54(b), and entered final judgment to allow this appeal to proceed. Carolyn now appeals the district court's grant of summary judgment in favor of Mitsui and KII. The dispositive question

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2. 12 U.S.C. § 1972(1) (a) & (1) (c) (1989 & supp. 1997).

of the appeal is whether a genuine issue of material fact exists with respect to Mitsui's coercion upon Carolyn to serve the relationship between Mitsui and KII, and whether or not Carolyn presented proof of its ability to satisfy the conditions set forth in the loan commitment.

II. DISCUSSION

A. Standard of Review

When we review the grant of summary judgment, we apply the same legal standard that bound the district court.[3] Summary judgment is appropriate if the pleadings, depositions, and affidavits submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[4]

> [T]he plain language of Rule 56 (C) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving

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3. *Early v. Champion Int'l, Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990).

4. FED. R. CIV. P. 56 (c) .

> party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.[5]

The trial court "must consider all the evidence in the light most favorable to the non-moving party" and resolve all reasonable doubts in favor of the non-moving party.[6] A trial court, however, need not resolve all doubts in such a manner.[7] "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."[8] Where, as here, discovery has been conducted, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[9]

B. Bank Holding Company Act Claim

Carolyn claims that Mitsui and KII had an undisclosed relationship in which they would mutually benefit from KII being the general contractor in the building of the hotel.

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5. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

6. *See Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987).

7. *Barnes v. Southwest Forest Indus., Inc.* 814 F.2d 607, 609 (11th Cir. 1987).

8. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

9. *Id.* at 249-50 (citations omitted).

Appendix A

Carolyn asserts that Mitsui violated the BHCA by conditioning its loan commitment on KII providing a GMP contract and KII's participation as general contractor. Carolyn argues that the district court improperly interpreted the anti-tying provisions of the BHCA when that court found dispositive that Carolyn's initial and voluntary selection of KII as the general contractor automatically barred Carolyn's BHCA claim.

Congress enacted the anti-tying provision "to prohibit anticompetitive practices which require bank customers to accept or provide some other service or product or refrain from dealing with other parties in order to obtain the bank product or service they desire."[10] The anti-tying provision of the BHCA proscribes banks from extending credit or furnishing a service on the condition or requirement that the customer obtain from or provide to the lending bank some additional credit, property, or service other than those related to and usually provided in connection with a loan.[11]

Under the BHCA, a plaintiff need not show any specific adverse effects on competition or other restraints of trade or any degree of bank dominance or control over the tying product or service.[12] In order to succeed under the anti-tying provision

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10. Senate Banking Committee Rep. No. 90-1084, 91st Cong., 2d Sess. (1970) *reprinted in* 1970 U.S.C.C.A.N. 5519, 5535.

11. 12 U.S.C. §§ 1972 (1)(a), (1)(c) (1989 & Supp. 1997).

12. *Integon Life Ins. Corp. v. Browning*, 989 F.2d 1143, 1150 (11th Cir. 1993) *quoting* S.Rep. No. 91-1084, 91st Cong. 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 5519, 5558 (Supplementary Views of Edward W.

(Cont'd)

of the BHCA the plaintiff must establish (1) that there were two products, a tied and tying product, and (2) that the buyer was in fact forced to buy the tied product to get the tying product. This court has held that the plaintiff must prove that the lending bank forced or coerced the plaintiff into purchasing the tied product.[13] A tying thus occurs when the purchaser is forced to buy the tied product to obtain the tying product.[14] Therefore, in order to succeed on its BHCA claim Carolyn must prove that Mitsui forced or coerced Carolyn into using KII as the general contractor as a condition to obtaining the loan.

Carolyn alleges a close, undisclosed relationship between Mitsui and KII existed which forced Carolyn to

(Cont'd)

Brooke). Because banks play a unique economic role, "Congress perceived conditional transactions involving credit as inherently anti-competitive . . . [and] intended to regulate conditional transactions in the extension of credit by banks more stringently than had the Supreme Court under the general anti-trust statutes. . . . Central to this more stringent regulation of the banking industry was Congress's decision to exclude from the bank anti-tying provisions the market share and anti-competitiveness requirements which were the cornerstone of tying claims under the general anti-trust statutes." *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.2d 300, 305 (5th Cir. 1990); *see also Integon*, 989 F.2d at 1151.

13. *Integon*, 989 F.2d at 1151. *But see Dibidale of La. v. American Bank & Trust Co.*, 916 F.2d 300, 306 (5th Cir. 1990) ("[t]ie-ins may result from actual coercion by a seller or from a customer's realization that he stands a better chance of securing a scarce and important commodity (such as credit) by 'volunteering' to accept [or provide] other products or services rather than seeking them in the competitive market place.") (quoting Conf. Rep. 1747, 91st Cong. Sess., *reprinted in* 1970 U.S.C.C.A.N. 5561, 5569).

14. *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1414 (11th Cir. 1987).

provide additional credit and property to Mitsui other than that usually provided in connection with the construction loan. Carolyn demonstrates that Mitsui and a subsidiary of KII had entered into a $10 million guarantee on September 18, 1990; in 1991, Mitsui held about 3.7% of stock in KII's parent corporation, Kajima Corporation, and Kajima Corporation held approximately 1.5% of Mitsui stock; KII had performed interior work for Mitsui's New York branch; and KII and Mitsui had met outside of the presence of Carolyn during the preconstruction phase of the Miami hotel project. Carolyn suggests that given their relationship, KII and Mitsui would mutually benefit from the project because KII's participation would provide more security to Mitsui on its loans and Mitsui would acquire new business from KII taking their relationship to a deeper level.

The district court held that because Carolyn voluntarily selected KII well before Mitsui's involvement in the project, Carolyn's allegation of coercion cannot satisfy the elements of BHCA violation. The district court found dispositive the fact that Carolyn approached Mitsui for the loan nearly six months after entering into a Letter of Intent with KII. Relying on an Eighth Circuit ruling,[15] the district court determined that where a borrower voluntarily relinquishes an absolute right, his decision cannot be the product of coercion necessary to prove an unlawful tying arrangement under the BHCA.

While we agree with the district court dismissal of the BHCA claim, we do so for different reasons.[16] This court has suggested

15. *Rayman v. American Charter Fed. Sav. & Loan Ass'n*, 75 F.3d 349 (8th Cir. 1996).

16. *See Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997); *see Collins v. Seaboard Coastline R. Co.*, 681 F.2d 1333, 1335 (11th Cir. 1982) ("If a decision of law is correct, that the lower court incorrectly reasoned its way to that decision is irrelevant on appeal.")

that merely because the borrower purchased or obligated himself to purchase the undesirable product either before or contemporaneously with the loan does not necessarily vitiate a BHCA claim.[17] If the condition was illegal, that condition, regardless of when entered, should not be enforceable.

Nevertheless, under the facts of this case, Carolyn has not demonstrated a genuine issue of material fact as to whether Carolyn was forced or coerced into using KII in order to receive Mitsui's loan. Mitsui's loan commitment to Carolyn was nonrecourse, meaning that Mitsui would be barred from action against Carolyn if the security value fell below the amount required to repay the loan. For a bank, a nonrecourse loan involves construction risks and management of properties risks as the borrower is not responsible to repay the loan except to the extent of the collateral. For this reason, Mitsui required that the general contractor provide a GMP contract.[18] When Mitsui was informed in September 1990 that Turner would substitute KII as general contractor, Mitsui had cause to be apprehensive. The project had gone on for ten months with promises made by Carolyn to various parties that closings would occur in March, July, August, September and October.

By Hirohisa Gotoda's September 26, 1990 letter, Mitsui advised Carolyn that it might substitute Turner for KII so long

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17. *Integon*, 989 F.2d at 1152.

18. A GMP contract is a cost-plus contract with a guaranteed limit (a price which the general contractor guarantees will not be exceeded). If the actual cost is higher than the guaranteed maximum price, the general contractor must bear those costs. Under a GMP contract, costs the general contractor actually incurs are substantiated on a monthly basis and are submitted to the developer and the lender for review and monitoring.

as the transaction was structured on KII's GMP and Carolyn satisfied conditions consistent with the original loan commitment. The letter expressed Mitsui's confidence in KII's ability. Given that KII had studied the project for over one year, Gotoda wrote "[Mitsui] had very little concern that [KII] would come back with significant change orders in the future. We do not have that same confidence with Turner as they only had two weeks to prepare their estimate." Nonetheless, Gotoda went on to state that "after taking account of all parties' diligent work over the past year, we may be able to proceed with Turner's contract" subject to the conditions.

Through deposition testimony, Carolyn claims that after Mitsui learned of KII's termination Carolyn's Ira Sukoff, Marty Duhner and Larry Evans had a telephone conversation with Mitsui's Gotoda. Carolyn claims that Gotoda stated that Carolyn either build the hotel with KII or it would not be built it at all. No notes were taken nor recordings made during or subsequent to this alleged conversation. The September 26, 1990 letter states that Mitsui was willing to allow Turner to be substituted for KII. As we have stated before, "[w]hile not necessary to the decision in this case, it would appear that something more than a naked and unsubstantiated allegation should be required to create an issue of material fact relative to whether the complaining party was coerced into purchasing the tied product or service .... Were we to permit the mere unsubstantiated allegation of an oral coercion to undermine the force and legal effect of language in transactional documentation . . . we would be inviting commercial chaos."[19]

The letter states that Turner would be considered if the following conditions were met: a joint and several completion

19. *Integon*, 989 F.2d at 1152 n.21.

guaranty from the Japanese investors; a bank letter of credit in the amount of $5 million; and Turner's contract including all FF&E costs conforming to the general contractor provision of the loan commitment. Mitsui required the extra conditions because as far as Mitsui was concerned, the substitution occurred very suddenly, and the change of general contractor was a material change in the loan commitment affecting the risks of a nonrecourse loan. Carolyn approached Mitsui to build this hotel using KII as an added incentive. Carolyn acknowledges that the use of a Japanese contractor would help secure a loan from a Japanese based bank. Gotoda stated that while he felt Turner was capable of construction for the project, in an effort to mitigate any cost overrun risk, the added conditions were necessarily based, in part, on Mitsui's previous interaction with the substituted contractor and the short time frame that Turner had been on the project.

Courts have determined that conditioning the extension of credit on measures designed to insure that the bank's investment is protected is well within traditional banking practices that do not engender anti-competitive practices that give rise to a claim under the BHCA.[20] While the BHCA is concerned with the conditions required in a loan commitment, regardless of when they are imposed, if the conditions imposed are "related to and usually provided in connection with a loan," the BHCA is not violated.[21] This circuit has recognized as traditional banking conduct for banks to constantly re-examine loan portfolios and reevaluate the risks and security needs of its loans.[22] Given the

20. *See, e.g., New England Co. v. Bank of Gwinnet County,* 891 F.Supp. 1569, 1573-75 (N.D.Ga. 1995).

21. *McCoy v. Franklin Sav. Ass'n, 636* F.2d 172, 175 (7th Cir. 1980).

22. *Id.*

nonrecourse nature of this project, the time that had been available to KII as the first proposed contractor, the limited time available in which Turner could have reviewed the project, the number of extensions already granted, and the limited progress of Carolyn toward loan closing, it clearly was reasonable for Mitsui to consider Turner upon new terms.

The record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII. Turner never submitted a GMP within or outside of budget that would conform to the loan commitment.[23] In an October 29, 1990 letter from Mitsui to Carolyn, Mitsui invited Carolyn to prepare and submit a revised loan proposal. Carolyn never acted on that invitation. Ample evidence established that, irrespective of who was selected as the general contractor, Carolyn failed to meet many of the loan conditions and provided Mitsui with valid justification not to further extend the loan commitment. Mitsui did not tie the loan to Carolyn's use of KII.[24]

There is another obstacle to Carolyn's claim. Under Florida law, the holder of a promise based upon a condition precedent cannot profit from an anticipatory repudiation of the contract that he would have breached himself. If performance of the conditions precedent is excused, the ability to perform them

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23. At the end of December 1990, Carolyn released Turner as general contractor without explanation.

24. Carolyn further alleges that KII tortiously interfered with its business relationship. After Carolyn terminated KII as the general contractor, Carolyn alleges that KII deliberately caused Mitsui to reject Carolyn's use of Turner as the contractor for the project. Because we find that Mitsui provided Carolyn with an opportunity to use Turner if Carolyn met the conditions set forth in the September 26, 1990 letter, we find this claim to be without merit.

must still be shown.[25] The record is replete with evidence that, regardless of the general contractor, Carolyn could not have met the conditions set forth in the loan commitment prior to closing. Under the terms of the loan commitment Mitsui set forth various requirements in order to close on the construction loan. Most of those requirements did not involve the general contractor. The loan commitment required, inter alia, the completion of 100% working drawings, completions of FF&E drawings and budgets, and execution of a final and binding construction agreement with Kajima with a guaranteed maximum price for both hard costs and FF&E. Carolyn was well aware of these requirements as evidenced by several letters written between and among the joint venturers. Sukoff, however, failed to disclose all the information to all of the participants in this transaction. KII was not informed of its obligation to supply FF&E costs until June 28, 1990.

The record indicates that many of the items of the loan commitment which were to be in place 15 days before the closing date had not been completed nor delivered to Mitsui prior to October 1, 1990, October 5, 1990, or November 1, 1990. Carolyn's letter dated October 30, 1990, admits that the project was still not in budget. Even assuming a valid November 1, 1990 extension, Carolyn failed to provide Mitsui with a GMP contract consistent with the approved budget of October 17, 1990. As of that date, Carolyn had no general contractor committed by contract, Turner's estimate and its subsequent bids never met the conditions of the commitment letter in that the bids exceeded the approved budget for the hard costs of

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25. *Hospital Mortgage Group v. First Prudential Dev. Corp.*, 411 So.2d 181, 183 (Flat 1982)("[T]o allow recovery . . . is to give credit for doing what they were unable to do even after the termination date had been extended by nineteen weeks.")

construction, those bids did not include all FF&E costs, nor had Turner submitted a GMP contract.

Further, the evidence clearly indicates that the Japanese investors terminated the escrow agreement in April 1990. While the investors indicated a willingness, up to a point, to fund the project, the termination of the escrow agreement and the withdrawal of funds was a material adverse change in Carolyn's financial condition in violation of the loan commitment. Further funding was no longer governed by either the escrow agreement or the joint venture agreement. In addition, Carolyn never produced the $3 million letter of credit, completed plans and specifications, financial statements or submissions regarding contractors and subcontractors as required by the commitment letter. As of November 1, 1990, the broker with whom Carolyn had contacted to obtain a letter of credit was still not under contract and refused to secure a letter of credit or financial guaranty bond guaranteeing principal and interest for the $3 million letter of credit without that signed contract. The closing date required by the commitment letter was not achievable within the original period as extended in writing to October 1, 1990, October 5, 1990, or as allegedly orally extended to November 1, 1990.

The commitment letter required that these material items, under the general conditions section of the commitment letter, be completed 15 days prior to the loan closing. The loan commitment required the submission and acquisition of numerous independent items, the lack of any one may be fatal to the entire set of conditions precedent and thus to Mitsui's obligation to lend the sums involved.[26] Carolyn simply was not

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26. *See id.* at 183.

able to comply with the commitment letter on October 1, October 5, or November 1, 1990.

C. Breach of Contract Claim against KII

Carolyn brought a breach of contract claim based on KII's alleged role resulting in Carolyn's failure to submit a GMP contract and to meet other conditions of the commitment letter with Mitsui. Carolyn focuses their claims against KII on the Letter of Intent executed by these parties on April 18, 1989, and on KII's alleged illegal-activities involving Mitsui following execution of that agreement.

KII did perform its promise to estimate costs for as many architectural drawings as it was given. KII was not bound to construct the hotel at any price. Carolyn displayed no dissatisfaction with KII's services or with the potential contract until its estimated costs exceeded $26 million.

The evidence in the record does not support an issue that KII's actions affected Carolyn's ability to build the proposed hotel. KII played no role in selecting Mitsui as financier of this project nor did KII cause the Japanese investors to terminate the escrow agreement or cause Carolyn to fail to obtain a letter of credit. Because we find that Carolyn's inability to close the loan rests solely on Carolyn's inability to meet several of the conditions precedent not involving KII or Mitsui, Carolyn's breach of contract claim was properly dismissed by the district court.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA CERTIFYING FINAL SUMMARY JUDGMENT FOR APPEAL, AMENDING AND CLARIFYING JUDGMENT, AND STAYING PROCEEDINGS FILED APRIL 4, 1996

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2113-CIV-FERGUSON

Carolyn Properties I, a Florida general partnership, Carolyn Properties, Inc., a Florida corporation, et al.,

Plaintiffs,

v.

The Mitsui Trust & Banking Co., Ltd., a foreign corporation and Kajima International, Inc., a foreign corporation,

Defendants.

ORDER CERTIFYING FINAL SUMMARY JUDGMENT FOR APPEAL, AMENDING AND CLARIFYING JUDGMENT, AND STAYING PROCEEDINGS

On February 29,1996, this Court entered an Order on Motions for Summary Judgment finding that defendants were entitled to a judgment as a matter of law as to plaintiffs' claims and Final Summary Judgment reflecting that ruling. On March 5,1996, the Court entered a supplemental Order Clarifying the Final Summary Judgment which stated its intention as "to show a complete disposition of the case." Plaintiffs' have filed a

motion for Rule 54(b) certification to appeal the Court's February 29, 1996 "Final Summary Judgment" or, alternatively, for leave to appeal under 28 U.S.C. § 1292(b). Defendant Kajima International Inc. has filed a motion to alter or amend the final Summary Judgment, and Defendant Mitsui has filed a motion for clarification of the Final Summary Judgment pursuant to F.R. Civ. P. 59(e).

An order is certifiable under Rule 54(e) if it disposes of at least one claim with the degree of finality required to satisfy the standards for appeal set forth in 28 U.S.C. § 1291. *Seal-Flex, Inc. v. Athletic Track and Court Const.,* 870 F.Supp. 753 (E.D. Mich. 1994). The order must terminate all issues presented in at least one claim so that nothing remains to be done other than enforcement of the judgment. *Id.* In this case, the Court's Orders terminated all issues presented in plaintiffs' second amended complaint.

As stated in the Order on Motions for Summary Judgment, "the question presented was a very narrow but critical point of law. This Court is of the view that a summary judgment should be entered, and that the plaintiffs should seek appellate review." In making this determination, the Court considered the relationship between the adjudicated and unadjudicated claims and the costs of proceeding where appeal would affect disposition of the remaining claims. *See Local Union No. 1812, United Mine Workers v. BethEnergy Mines, Inc.*, 992 F.2d 569 (6th Cir. 1994). Accordingly, it is

ORDERED AND ADJUDGED that Plaintiffs' motion for Rule 54(b) certification to appeal the Court's February 29, 1996 Final Summary Judgment is GRANTED and the alternative motion for leave to appeal under 28 U.S.C. § 1292(b) is

DENIED as moot. The question certified is stated on page one of the Order on Motions for Summary Judgment. It is further

ORDERED AND ADJUDGED that Defendant Kajima International Inc.'s motion to alter or amend the Final Summary Judgment and Defendant Mitsui's motion for clarification of the Final Summary Judgment pursuant to F.R. Civ. P. 59(e) are GRANTED. The action is stayed as to Defendants' counterclaims pending resolution of Plaintiffs' appeal.

DONE AND ORDERED in Chambers in Miami, Florida this 4th day of April, 1996.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

Copies provided:
Counsel of record

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA CLARIFYING FINAL SUMMARY JUDGMENT FILED MARCH 5, 1996

UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2113-CIV-FERGUSON

Carolyn Properties I, a Florida general partnership, Carolyn Properties Inc., a Florida corporation, et. al.,

Plaintiffs

vs.

The Mitsui Trust & Banking Co., Ltd., a foreign corporation and Kajima International, Inc., a foreign corporation,

Defendants.

ORDER CLARIFYING FINAL SUMMARY JUDGMENT

In order to clarify the Final Summary Judgment entered herein, dated February 29, 1996, the Court enters this supplement to show a complete disposition of the case. On undisputed evidence the Court found that the plaintiffs' unilateral disharge of Kajima consituted a breach of a material temm of the commitment letter which relieved Mitsui of its obligations to perform. Because there was no right of the plaintiff to continue the contract by substituting Turner Construction as general contractor, there was no contract to be interfered with by Kajima. No action for tortious interference with a business relationship can lie unless there is a proof that

there is a "actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812 (Flat 1994). It follows that no such interference can occur where the contract at issue has been breached by the party claiming a loss by unjustifiable interference. Accordingly, Final Summary Judgment is entered for both defendants.

If this determination is reversed by the appellate court, the cause shall be reinstated as to both Mitsui and Kajima.

DONE AND ORDERED in Chambers in Miami, Florida this 5th day of March, 1996.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

Copies provided:
Counsel of record

APPENDIX D — ORDER ON MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED FEBRUARY 29, 1996

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2113-CIV-FERGUSON

Carolyn Properties I, a Florida general partnership, Carolyn Properties, Inc., a Florida corporation, et al.,

Plaintiffs,

vs.

The Mitsui Trust & Banking Co., Ltd., a foreign corporation and Kajima International, Inc., a foreign corporation,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

This cause came before the court on the defendant's objections to a Report and Recommendation of the Magistrate Judge recommending a denial of summary judgment motions. The parties were ordered to appear at a pretrial conference prepared to discuss the following dispositive issue:

> Whether a lender's insistence, expressed or implied, that a borrower/developer continue with the builder named in the application for a loan, which builder

is also approved by terms of the lender's commitment letter, constitutes an unlawful tying arrangement in connection with the extension of a loan.

The question presented is a very narrow but critical point of law which should be reviewed before proceeding with the anticipated 4-6 weeks of trial time. This Court is of the view that a summary judgment should be entered, and that the plaintiffs should seek appellate review.[1]

Relevant Facts

This is an action for damages initiated by Carolyn Properties I, a Florida partnership, and its partners, the developers of a proposed hotel on Miami Beach, Florida, against Mitsui Trust & Banking Company ("Mitsui"), the proposed lender for the hotel project, and Kajima International Co., Inc. ("Kajima"), the construction contractor on the project. Carolyn Properties I and its partners (hereinafter "plaintiffs") and Kajima executed a Letter of Intent, dated December 18, 1986, pursuant to which Kajima was to provide preconstruction services for the project in advance of a possible construction contract to be entered into between these parties at a later date.

On January 11, 1990, a commitment letter for financing the hotel construction was signed by plaintiffs and Mitsui whereby Mitsui agreed to make a $27 million dollar loan to plaintiffs subject to several conditions set forth in the letter of commitment. Among other conditions, the letter required that:

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1. In fairness to the Magistrate Judge, who reviewed a voluminous record and heard hours of argument before entering the scholarly report which the Court is reviewing, several concessions extracted at the pretrial conference and at the hearing on objections account for this Court's ruling.

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> Kajima International, Inc. (the "General Contractor") must provide a guaranteed maximum price contract (including a guaranteed maximum price for all FF&E costs) in form and substance satisfactory to Lender [Mitsui] and for a guaranteed maximum price acceptable to Lender and consistent with the approved Budget.

The commitment letter also required two letters of credit by Japanese investors, and that there be no adverse material change in Carolyn Properties' financial condition prior to closing.

On September 21, 1990, plaintiffs advised Kajima that it would not be retained as the general contractor for the project, citing prohibitive cost increases as the reason for this termination, and two days later advised Mitsui that Kajima would not be the general contractor for the hotel project. Kajima had not, and did not subsequently, execute a guaranteed maximum price contract.

Plaintiffs further advised Mitsui that its new contractor, Turner Construction Company, had submitted only a cost estimate for the project, and not a guaranteed maximum price contract as required by the commitment letter. On September 26, 1990, Mitsui advised Carolyn Properties that it would not provide funding on the same terms as previously indicated if Turner were substituted as general contractor. On October 29, 1990, Mitsui advised Carolyn Properties in writing that as the plaintiffs had not complied with the terms of the commitment letter, it had expired according to its terms on October 5, 1990.

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Legal Analysis

Count I of the second amended complaint alleges that Mitsui violated the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1972, by conditioning or requiring plaintiffs to use Kajima as the general contractor for the project.[2] Plaintiffs allege that Mitsui's requirement for their use of Kajima as the general contractor for the project was an unlawful "tying arrangement" of a banking service as a condition of the loan.

Section 1972(1), denominated the bank anti-tying provision of the Bank Holding Company Act, contains five parallel proscriptions. Subsection D, applicable here, states:

> A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement —
>
> > (D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company . . .

Specifically, plaintiffs allege that there was a close, undisclosed relationship between Mitsui and Kajima which "forced plaintiffs to provide additional credit and property to Mitsui" other than that usually provided in connection with the

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2. In light of the disposition of Count I, Count II for breach of contract also falls. No relief can be granted on Count III, unjust enrichment, because there is a written agreement which was deliberately entered into by the parties. *Santovenia v. Confederation Life Association,* 460 F.2d 805 (5th Cir. 1972).

construction loan. The facts, however, are unlike that of a typical tying case. The actual thrust of the plaintiff's first argument, as conceded, is that Section 1972(1) is a prophylactic rule which prohibits any tying arrangement in a banking transaction even in the absence of coercion. That was the rationale in *Dibidale of La. v. American Bank & Trust Co.*, 916 F.2d 300 (5th Cir. 1990), where the Court adopted Congress' opinion that "tie-ins may result from actual coercion by a seller or from a customer's realization that he stands a better chance of securing a scarce and important commodity (such as credit) "volunteering" to accept [or provide] other products or services rather than seeking them in the competitive market." *Id.* at 306 (quoting Conf. Rep. No. 1747, 91st Cong. 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5561, 5569).

Dibidale's interpretation of the BHCA, however, was expressly rejected by the Eleventh Circuit in *Integon Life Ins. Corp. v. Browning*, 989 F.2d 1143, 1151, n.20 (11th Cir. 1993). There, the Court held that to establish a tying violation a plaintiff must prove that the bank forced or coerced the plaintiff into purchasing the tied product. A tying claim under the BHCA has two elements: (1) two separate products, a "tying" or "desirable" product and a "tied" or "undesirable" product; and (2) the buyer was in fact forced to buy the tied product to get the tying product; that is, a "tying." *Id.* A tying occurs when the purchaser is forced to buy the tied product to obtain the tying product: "[T]he plaintiff must establish that the seller *forced or coerced* the buyer into purchasing the tied product." *Id* (quoting *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1415 (11th Cir. 1987).

Alternatively, the plaintiff contends that the requirement of good faith, which the law reads into all commercial contracts,

obligated Mitsui to allow a substitution of a general contractor when Kajima raised its construction price sharply after the commitment letter had issued. Carolyn Properties claims Mitsui's insistence that it continue with Kajima and denial of the opportunity to proceed with the loan with Turner Construction as a substitute contractor for Kajima, after Kajima raised its construction costs from $17.0 to $26 million, was coercive. This argument is not persuasive. Such alleged coercion, occurring after voluntary entry of the parties into the commitment letter, does not satisfy the elements required to show a violation of BCHA. A party's insistence upon rights and obligations expressed as terms in a contract does not constitute a breach of the implied covenant of good faith. *Destin Savings Bank v. Summerhouse of FWB, Inc.*, 579 So. 2d 232, 237 (Fla 1st DCA 1991). Analogously, in *Ragman v. American Charter Federal Savings & Loan Association,* 1996 U.S. App. LEXIS 1074 (8th Cir. January 29, 1996), the Court held that where a borrower voluntarily relinquished an absolute right to transfer servicing of his loan to an entity he controlled, his decision was not the product of the coercion necessary to prove an unlawful tying arrangement under the BCHA.

In the context of lending agreements, which do not specifically provide a right to modify, the good faith requirement cannot apply to alter risks which were assumed through the process of negotiation. *East Bay Ltd v. American General Life & Accident Ins. Co.*, 744 F.Supp. 1118, 1123 (M.D. Fla. 1990) aff'd, 937 F.2d 619 (11th Cir. 1991) (holding that the defendant has no duty to alter the terms of the contract, only to act in good faith in the performance of those terms); *see also Hashwani v. Barbar,* 822 F.2d 1038,1040 (11th Cir. 1987) (refusing to rewrite an agreement to make it more favorable to a party than the agreement that party signed).

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Conclusion

Mitsui has also shown by undisputed evidence that the hiring of Kajima by Carolyn Properties was a voluntary act, which it subsequently approved on conditions which were imposed as a protection against a loss. The plaintiffs' unilateral discharge of Kajima constituted a breach of a material term of the commitment letter, which relieved Mitsui of its obligations to perform. To accept Carolyn Properties' argument, that the right to substitute contractors is inherent in the contract, would require an impermissible judicial rewriting of the agreement and saddle Mitsui with a risk for which it had not bargained. For these reasons the defendants are entitled to a summary judgment as a matter of law.

DONE AND ORDERED in Chambers in Miami, Florida this 29th day of February, 1996.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

Copies provided:
Counsel of record

APPENDIX E — FINAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED FEBRUARY 29, 1996

UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2113-CIV-FERGUSON

Carolyn Properties I, a Florida general partnership, Carolyn Properties, Inc., a Florida corporation, et al.,

Plaintiffs,

vs.

The Mitsui Trust & Banking Co., Ltd., a foreign corporation and Kajima International, Inc., a foreign corporation,

Defendants.

FINAL SUMMARY JUDGMENT

By an Order on Motion for Summary Judgment entered on February 29, 1996, the Court found on undisputed evidence that the plaintiff was not coerced into a tying arrangement with the defendants in violation of the Bank Company Holding Act, 12 U.S.C. § 1972, and that the defendants were entitled to a judgment as a matter of law. It is therefore

ORDERED AND ADJUDGED that a Final Summary Judgment is entered for the defendants and that the plaintiffs shall take nothing by this action. Jurisdiction is reserved to tax costs.

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DONE AND ORDERED in Chambers in Miami, Florida this 29th day of February, 1996.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA SUBMITTED OCTOBER 25, 1995

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No.: 92-2113-CIV-NESBITT

CAROLYN PROPERTIES I, a Florida general partnership; CAROLYN PROPERTIES, INC., a Florida corporation; JOIVECA CORPORATION, a Florida corporation; JLP HOLDINGS, INC., a Florida corporation; TK HOLDINGS, INC., a Florida corporation' HHC MIAMI, INC.; and UNIVERSAL CONSULTANTS LTD., CO.,

Plaintiffs,

vs.

THE MITSUI TRUST & BANKING CO., LTD., a foreign corporation; and KAJIMA INTERNATIONAL, INC., a foreign corporation,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on (1) Mitsui's Motion for Summary Judgment Based on Newly Produced Documents (D.E. 547) filed on March 9, 1995; (2) Mitsui's Motion for Partial Summary Judgment Directed to Plaintiffs' Damage Claims (D.E. 554) filed on March 20, 1995; (3) Kajima International Inc.'s Motion for Partial Summary Judgment Directed at Plaintiffs'

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Damage Claims (D.E. 558) filed on March 20, 1995 and (4) Kajima International Inc.'s Renewed Motion for Summary Judgment (D.E. 560) filed on March 20, 1995. On January 27, 1994, these motions were referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Wilkie D. Ferguson, Jr., for a report and recommendation pursuant to 28 U.S.C. Sec. 636(b). Accordingly, the undersigned conducted a hearing on these motions on August 17, 1995. Having carefully considered these motions, all responses and replies thereto, the extensive evidentiary record in this case[1], the court file and applicable law, the undersigned respectfully recommends:

(1) that Mitsui's Motion for Summary Judgment Based on Newly Produced Documents (D.E. 547) be DENIED;

(2) that Mitsui's Motion for Partial Summary Judgment Directed to Plaintiff's Damage Claims (D.E. 554) be DENIED;

(3) that Kajima's Motion for Partial Summary Judgment Directed at Plaintiff's Damage Claims (D.E. 558) be DENIED; and

(4) that Kajima's Renewed Motion for Summary Judgment (D.E. 560) be DENIED.

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1. The undersigned notes that an exhaustive and comprehensive review of all the evidence in the record, which required weeks of reviewing the reams of documents provided, was conducted in order to reach the conclusions set out in this Report and Recommendation. As part of that review, the undersigned thoroughly reviewed the chart provided by defendant Mitsui in its attempt to support its motion for summary judgment. Although the evidence may be persuasive at trial, the undersigned finds, after reviewing each and every referenced exhibit that material issues of fact exist with regard to the propositions raised thereby precluding this Court from recommending summary judgment for either defendant.

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INTRODUCTION

This is a diversity action for damages initiated by Carolyn Properties I, a Florida partnership, and its partners, the developers of a proposed hotel on Miami Beach, against Mitsui Trust & Banking Company ("Mitsui"), the proposed lender for the hotel project, and Kajima International Co., Inc. ("KII"), a construction contractor which bid on the project. The undisputed evidence in this case[2] reveals that Carolyn Properties I and its partners (hereinafter "plaintiffs") and KII executed a Letter of Intent, dated December 18, 1989, pursuant to which KII was to provide preconstruction services for the project in advance of a possible construction contract to be entered into between these parties at a later date.

On January 11, 1990, a commitment letter for financing of the hotel was signed by plaintiffs and Mitsui whereby Mitsui agreed to loan $27 million dollars to plaintiffs subject to several conditions set forth in the commitment letter. Among other provisions, the commitment letter required that:

> Kajima International, Inc. (the "General Contractor") must provide a guaranteed maximum price contract (including a guaranteed maximum price for all FF&E costs) in form and substance satisfactory to Lender [Mitsui], and for a guaranteed maximum price acceptable to Lender and consistent with the approved Budget.

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2. This introduction does not, by any means, summarize all undisputed or disputed facts in this case. Rather, this introduction is intended only to provide the Court with a brief summary of this case. Additional facts, both disputed and undisputed, are referenced below.

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Additionally, the commitment letter also required two Japanese investors, HHC Miami, Inc. ("HHC") and Universal Consultants, Ltd. ("Universal"), to each contribute $2.5 million in equity; a $3 million dollar letter of credit; and that there be no adverse material change in Carolyn Properties' financial condition prior to closing. The commitment letter provided for an expiration date of July 1, 1990. This expiration date was extended three times in writing with a final written extension date set for October 1, 1990. For the purposes of these motions for summary judgment, the defendants do not contest plaintiffs' assertion that the commitment letter was further extended orally up to and including November 1, 1990.

On September 21, 1990, plaintiffs advised KII that it would not be retained as the general contractor for the project. No construction contract was ever entered into between plaintiffs and KII or any other party. On September 23, 1990, plaintiffs advised Mitsui that Carolyn Properties had terminated its relationship with KII and that KII would not be the general contractor for the hotel project. Plaintiffs further advised Mitsui that Turner Construction Company had submitted a cost estimate for the project. On September 26, 1990, Mitsui corresponded with Carolyn and advised it that it would not provide funding on the same terms as previously indicated if Turner was to be utilized. On October 29, 1990, Mitsui advised Carolyn Properties in writing that plaintiffs had not complied with the terms of the commitment letter so that the commitment letter had expired on October 5, 1990.

On September 7, 1993, plaintiffs filed the instant lawsuit against Mitsui and KII. Plaintiffs' Second Amended Complaint alleged six causes of action against Mitsui, namely, a violation of the Bank Holding Company Act ("BHCA"), 12 U.S.C. Sec. 1972 (Count

I); breach of contract (Count II); unjust enrichment (Count III); promissory estoppel (Count IV); fraudulent inducement (Count VI); and fraudulent conspiracy (Count VII). Plaintiffs also sued KII in five counts, namely, breach of contract (Count V); fraudulent inducement (Count VI); fraudulent conspiracy (Count VII); promissory estoppel (Count Vie); and tortious interference with advantageous business relations (Count IX).

Both Mitsui and KII previously moved for summary judgment in favor on all counts of the Second Amended Complaint. This Court held a hearing on those motions on June 7, 1994. Thereafter, the undersigned issued a report and recommendation dated June 28, 1994, recommending the denial of those motions.

On August 23, 1994, this Court affirmed the undersigned's findings and recommendations and granted summary judgment in favor of KII on counts VI, VII and VIII; and in favor of Mitsui on counts IV, VI and VII. *See,* Order dated August 23, 1994. Thus, the only remaining counts of plaintiffs' Second Amended Complaint are Counts I (BHCA), II (breach of contract), and III (unjust enrichment) against Mitsui, and counts (breach of contract) and IX (tortious interference) against KII.

In March of this year, Mitsui and KII renewed their previous summary judgment motions relying on some newly produced documents as well as documents which were previously cited to this Court. Specifically, Mitsui and KII argue that they are entitled to judgment as a matter of law on the ground that plaintiffs have "admitted" that they did not, and could not, perform material terms of the commitment letter issued by Mitsui despite any actions or inactions by Mitsui and/or KII. Alternatively, Mitsui and KII move for partial summary judgment on the issue of damages.

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STANDARD OF REVIEW

The court in reviewing a motion for summary judgment is guided by the standards set forth in Rule 56(c) of the Federal Rules of Civil Procedure which provides as follows:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

The moving party bears the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 90 S.Ct. 1598, 1608 (1970). Further, in addressing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the non-moving party. *Clemons v. Dougherty County.* Gal, 684 F.2d 1365, 1368 (11th Cir. 1982), *citing, Adickes v.. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608; *Augusta Iron & Steel Works v. Employers Insurance of Wausau,* 835 F.2d 855, 856 (11th Cir. 1988). If the record presents issues of material fact the court must deny the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608. The non-moving party, however, cannot rest upon mere allegations, but must rebut any facts properly presented by the moving party through affidavits or other evidence demonstrating the existence of a genuine and material issue of fact for trial. *Id.* at 398 U.S. 155, 90 S.Ct. at 1607. Moreover, summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that

party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986).

ANALYSIS

I. *Mitsui's and KII's Motions for Summary Judgment*

In Count I of the Second Amended Complaint, plaintiffs allege that Mitsui violated the Bank Holding Company Act ("BHCA"), 12 U.S.C. Sec. 1972, by conditioning or requiring plaintiffs to use KII as the general contractor for the project.[3] Plaintiffs further allege that Mitsui's requirement for their use of KII as the general contractor for the project was an unlawful "tying arrangement" of a banking service as a condition of the loan. Specifically, plaintiffs allege that the close, undisclosed relationship between Mitsui and KII and between Mitsui and the Kajima Corporation "forced plaintiffs to provide additional credit and property to Mitsui" other than that usually provided in connection with a construction loan.

Section 1972(1)(a) and (1)(c) of the BHCA prohibits a bank from extending credit or furnishing a service on the condition or requirement that the bank's customer obtain from or provide to the lending bank some additional credit, property or service "other than those related to and usually provided in connection with a loan . . ." Section 1972 was enacted to "prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or to refrain from dealing with other parties in order to obtain the bank product or service they desire." Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970),

3. Count II (breach of contract) and Count II (unjust enrichment) are likewise integrally related to the allegations of Count I as well.

reprinted in 3 U.S. Code Cong. & Admin. News, pp. 5519, 5535 (1970); *see also Swerdloff v. Miami National Bank*, 584 F.2d 54, 58 (5th Cir. 1978).

Here, plaintiffs argue that Mitsui violated the anti-tying provisions of the BHCA by requiring plaintiffs to use KII as the general contractor for the hotel project as a requirement for the construction loan. In a similar context, the Fifth Circuit Court of Appeals has already determined that a bank's requirement for a builder's use of a particular contractor as a condition for a construction loan violates the BHCA. *See Dibidale of Louisiana v. American Bank and Trust Co.*, 916 F.2d 300 (5th Cir. 1990), *amended and reinstated on reh'g*, 941 F.2d 308 (5th Cir. 1991). Once again, the undersigned finds that plaintiffs present evidence through deposition testimony and the opinion of one of its experts capable of supporting their position that Mitsui required plaintiffs to use KII as the general contractor for the hotel, and refused to extend construction financing to plaintiffs on the same terms once KII was no longer being considered as the general contractor.

A. *Mitsui's Motion for Summary Judgment*

Mitsui argues in its renewed motion for summary judgment that the above finding is essentially irrelevant in that plaintiff is, according to Mitsui, unable to demonstrate that they could have performed other conditions precedent in the commitment letter. *See Hospital Mortgage Group v. First Prudential Development Corp.*, 411 So.2d 181, 183 (Fla. 1982) (borrower was required to show that it had, *or could have*, fulfilled the conditions required under the contract to close the loan) (emphasis added). Specifically, Mitsui and KII argue that plaintiffs could not meet essential terms of the commitment letter relating to:

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(a) obtaining a guaranteed maximum price ("GMP") contract that was consistent with the approved budget since their investors were not willing to make up any shortfall;

(b) obtaining a letter of credit in the amount of $3 million dollars; and

(c) the obligations of HHC and Universal to continue to invest in the project and with regard to their termination of plaintiffs' escrow agreement.

Although the documents referred to by defendants certainly strengthen their position, the undersigned still finds that material issues of fact exist as to whether Mitsui breached the loan commitment with Carolyn by prematurely terminating the loan commitment; by insisting on plaintiffs' use of KII as the general contractor; and by communicating with KII prior to the termination date. Moreover, the undersigned continues to conclude that the record contains genuine issues of material fact with regard to whether plaintiffs' alleged failure to satisfy conditions of the loan commitment were caused by Mitsui, and with regard to the actual reason for Mitsui's decision not to make this loan.

Additionally, plaintiffs present evidence that Mitsui repudiated the loan commitment in September 1990 when it told Carolyn, in writing, that it would not honor the loan commitment on the same terms unless KII remained as the contractor. The undersigned finds merit to plaintiffs' argument that they were no longer required to fulfill conditions precedent to the loan commitment once Mitsui repudiated the commitment so that they need only present evidence that could have fulfilled the conditions. The record evidence also presents questions of

fact with regard to whether the condition of using KII thwarted plaintiffs in fulfilling other conditions precedent of the loan commitment.

Further, addressing whether plaintiffs could have fulfilled the conditions referenced above despite defendants' alleged actions discussed above, the undersigned concludes that material issues of fact exist precluding this Court from entering summary judgment in favor of defendants. For example, Mitsui and KII argue that no letter of credit was obtained by plaintiffs and that such was a condition precedent to the loan. However, in reviewing the record evidence, defendants own representatives admit that such was not required until the loan closing which never occurred. Moreover, the testimony of plaintiffs' expert and broker raise further issues of fact with regard to defendants' arguments that a letter of credit *could* not have been obtained.

Moreover, defendants argue that the two Japanese investors were not willing to continue investing in the project and ceased doing so in April 1990. However, a thorough review of the record reveals that these investors continued to support the project financially, despite any misgivings they might have had, until November 1990. Clearly, the documents referenced by both sides of this case create a factual question on this important issue.

Defendants also argue that the escrow agreement between the parties was terminated and that plaintiffs were obligated to inform Mitsui of a change in the financial condition of Carolyn. As plaintiffs point out, the escrow account was not required by the loan commitment and as such the undersigned finds that this issue is not pertinent. The true question is whether the financial support by the investors was terminated and when,

not where, the money was placed. As stated above, material issues of fact exist with regard to the status of the financial backing of this project. Plaintiffs' evidence that the financing continued well after Mitsui's alleged repudiation creates one such issue. Moreover, contrary to defendants' assertions, the contemporaneous evidence indicates that plaintiffs' investors could have and would have satisfied any shortfall upon revision of their shares in the joint venture proportionate to their additional cash contribution.

Finally, the Court has already found that Mitsui could not have insisted on KII as the contractor without violating the BHCA. Thus, plaintiffs' inability to obtain a GMP from KII within the budget would not constitute a failure to fulfill a condition precedent in the commitment letter. Defendants argue that the Court should ignore the issue of obtaining a GMP from KII and focus on the fact that no GMP was obtained from Turner. However, as stated above, the undersigned finds that genuine issues of fact exist as to whether Mitsui's actions and KII's actions thwarted plaintiffs' ability to do so.[4]

In light of these findings, all related to the three counts against Mitsui, the undersigned concludes that summary

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4. Due to the undersigned's finding that an issue of fact still remains with regard to whether defendants' conduct caused plaintiffs' inability to fulfill conditions precedent to the loan, the undersigned finds that issues of fact also preclude summary judgment on defendants' argument that any damages or injury suffered by plaintiff was not proximately caused by defendants. Moreover, as the Eleventh Circuit has held "plaintiff need not prove defendant's actions were the sole proximate cause; plaintiff must only show . . . that defendant's conduct materially contributed to the injury." *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 783 (11th Cir. 1983).

(Cont'd)

judgment is precluded as to Counts I, II and III. Specifically, having already found facts in dispute preventing summary judgment in Mitsui's favor on the BHCA claim, the undersigned finds the same facts relevant to the breach of contract and unjust enrichment claims.

B. *KII's Motion for Summary Judgment*

As stated above, KII moves for summary judgment on Count V (breach of contract) and Count IX (tortious interference). Plaintiffs sue KII for its alleged role resulting in plaintiffs' failure to submit a GMP contract and meet other conditions of the commitment letter with Mitsui. Plaintiffs primarily focus their claims against KII on the Letter of Intent executed by these parties on April 18, 1989, and on KII's alleged illegal activities involving Mitsui following execution of that agreement.

KII argues, relying on the same evidence offered by Mitsui, that KII's actions had *no* impact on the plaintiffs' ability to build their proposed hotel. Based upon the reasons stated above, the undersigned finds that material facts are in dispute on this issue precluding summary judgment in favor of KII, as well. Additionally, the undersigned notes that evidence offered by plaintiffs' banking expert creates an issue of fact as to the illegality of KII's conduct in communicating with Mitsui about

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(Cont'd)

Defendants also argue that they are entitled to summary judgment since plaintiffs were in "disarray". The undersigned notes that a question of fact exists as to whether much of the "disarray" was caused by Mitsui's refusal to accept Turner on the same terms as KII thereby forcing plaintiffs to satisfy additional conditions not previously agreed to.

Appendix F

Turner, KII's undisclosed relationship with Mitsui, and the effect this had on plaintiffs' ability to close on this loan.

Further, as indicated in this Court's previous report and recommendation, material facts are still in dispute concerning KII's performance under the Letter of Intent. See, Report and Recommendation dated June 28, 1994, pgs. 25-26. Thus, the undersigned must again conclude that this Court cannot presently determine, on the basis of undisputed facts, whether all or a portion of plaintiffs' alleged damages were or were not proximately caused by KII's alleged breach of the Letter of Intent since the facts presented are still in dispute. KII argues, as does Mitsui, that plaintiffs could not fulfill its conditions precedent of the commitment letter so that KII could not have caused Mitsui to refuse to make the loan. For the same reasons as stated above with respect to Mitsui's motion for summary judgment, KII's motion must also fail.

Finally, KII moves for summary judgment on plaintiffs' tortious interference count wherein plaintiffs allege that KII, after being terminated as the general contractor, deliberately caused Mitsui to reject plaintiffs' use of Turner as the contractor for the project. Specifically, plaintiffs allege, among other things, that KII warned Mitsui that Turner's proposal was unreliable and urged Mitsui not to loan construction funds to plaintiffs unless they agreed to use KII for the project. First, the parties dispute the impact of the alleged statements. Second, as previously held, the undersigned finds that Mitsui may have been influenced by KII's communication and as such it might constitute interference when viewed in the full context of the case. Therefore, even in light of the applicable caselaw cited by KII, the undersigned finds that a material issue of fact exists with regard to whether plaintiffs would have been able to

consummate this project with Mitsui and KII but for the actions of Mitsui and KII. *See Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812 (Fla. 1994), *reh. denied*, (Jan. 11, 1995), *answer to certified question conformed to*, 47 F.3d 1099 (11th Cir. 1995); *United Yacht Brokers v. Gillespie*, 377 So.2d 668, 672 (Fla. 1979).

In its renewed motion, KII also argues that no action for tortious interference can be stated since the information it provided to Mitsui was truthful. *See, Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089 (11th Cir. 1994). A review of the record reveals that material issues of fact exist with regard to the truthfulness of the statement, its effect on Mitsui's decisions, and its effect on the project as a whole. KII argues that its statements were true and as such cannot form the basis for this claim. However, plaintiffs cite to equally compelling record evidence and expert testimony that the statements made by KII were false and interfered with plaintiffs' business relationship with Mitsui. Therefore, the undersigned finds the holding of *Worldwide Primates* inapplicable under the facts of this case since the plaintiff in that case knew from the beginning that the alleged interference had not harmed its business relationship with its client. In the instant case, plaintiffs have offered evidence that Mitsui terminated its loan commitment with Carolyn as a result of, or at least partially based on, KII's interference.

Therefore, based on the above findings, the undersigned recommends that Mitsui's and KII's Renewed Motions for Summary Judgment be DENIED.

Appendix F

II. *Mitsui's and KII's Motions for Partial Summary Judgment Directed at Plaintiffs' Damage Claims*

Mitsui and KII also move for partial summary judgment in their favor by arguing that plaintiffs are not entitled to recover lost profit damages. KII also argues that plaintiffs are not entitled to recover any damages from it since plaintiffs could not proceed with the project and as such a damage award would be purely speculative. So moving, both defendants attack the testimony provided by plaintiffs expert, Irwin I. Glick, and argue that his testimony should be disregarded since it clearly creates an issue of fact precluding summary judgment in either defendants' favor. Once again, the undersigned finds significant facts in dispute with regard to the issue of damages which prevent this Court from granting summary judgment in favor of the defendants.

First, defendants' argument that plaintiffs are not entitled to lost profits as a matter of law is not supported. Lost profits are recoverable for the claims asserted by plaintiff — breach of contract, violation of the BHCA, and tortious interference — and no special rule exempts defendants in this case from exposure to same.[5] *See e.q., W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two. Ltd.*, 545 So.2d 1348, 1350-51 (Fla. 1989); *DeLong Equip. Co. v. Washington Mills Electra Minerals Corp.*,

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5. Mitsui argues that lost profits are not recoverable upon breach of a commitment to lend money and KII argues that a contractor is not liable for lost profits when the project is not completed. The undersigned does not find these arguments applicable given the facts of this case. In this case, Carolyn asserts that it was unable to obtain a replacement loan. Mitsui contests this fact. Likewise, plaintiffs allege and have come forward with evidence that creates an issue of fact as to whether plaintiffs inability to build and operate the hotel was due to defendants actions. Thus, the cases cited by defendants are distinguishable from the facts as established in this action.

990 F.2d 1186, 1203-1205 (11th Cir. 1993), *cert. denied*, 114 S.Ct. 604 (1993); *Ad-Vantage Tel. Dir. Consult. v. GTE Directories*, 37 F.3d 1460 (11th Cir. 1994); *Cedar Hill Properties v. Eastern Federal Corp.*, 575 So.2d 673, 678 (Fla. 1st DCA), *rev. denied*, 589 So.2d 290 (Fla. 1991).

The undersigned next finds that defendants' arguments as to the speculative nature of plaintiffs' damages and the sufficiency of damage evidence is more appropriately decided by the jury. Moreover, the undersigned finds no merit to Mitsui's argument that lost profits were not in its reasonable contemplation at the time of entering into the loan commitment since Mitsui studied those projected profits prior to making its loan. Thus, as stated before, the question of whether the requested lost profits are truly speculative and whether they were in contemplation of the parties at the relevant time period are questions of fact which must be resolved at trial.

Likewise, the undersigned does not conclude that plaintiffs expert's testimony is inadmissible. Defendants' arguments go more to the weight which should be given to such evidence which is also an issue more appropriately decided at trial. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned the opinion rather than its admissibility and should be left for the jury's consideration. *Concise Oil & Gas v. La. Intrastate Gas Corp.*, 986 F.2d 1463, 1476 (5th Cir.), *reh. denied*, 990 F.2d 1254 (5th Cir. 1993).

Accordingly, for the above stated reasons, the undersigned recommends that defendants' motions for partial summary judgment on plaintiffs' damage claims be DENIED.

Appendix F

SUMMARY

For all of the foregoing reasons, the undersigned respectfully recommends:

(1) that Mitsui's Motion for Summary Judgment Based on Newly Produced Documents (D.E. 547) be DENIED;

(2) that Mitsui's Motion for Partial Summary Judgment Directed to Plaintiffs' Damage Claims (D.E. 554) be DENIED;

(3) that Kajima's Motion for Partial Summary Judgment Directed at Plaintiff's Damage Claims (D.E. 558) be DENIED; and

(4) that Kajima's Renewed Motion for Summary Judgment (D.E. 560) be DENIED.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Wilkie D. Ferguson, Jr., United States District Judge, within ten (10) days of receipt. *See* 28 U.S.C. sec. 636(b)(1)(C); *United States v. Warren*, 687 F.2d 347 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983); *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. Unit B 1982); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

Appendix F

RESPECTFULLY SUBMITTED at Miami, Florida, this 25th day of October 1995.

s/ Ted E. Bandstra
Ted E. Bandstra
United States Magistrate Judge

copies furnished to:

Hon. Wilkie D. Ferguson, Jr.
All Counsel of Record

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED NOVEMBER 23, 1994

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2113
Civ. — Ferguson

Magistrate Judge Bandstra

Miami Division

CAROLYN PROPERTIES I, a Florida general partnership; CAROLYN PROPERTIES, INC., a Florida corporation; JOIVECA CORPORATION, a Florida corporation; JLP HOLDINGS, INC., a Florida corporation; TK HOLDINGS, INC., a Florida corporation; HHC MIAMI, INC.; and UNIVERSAL CONSULTANTS LTD., CO.,

Plaintiffs,

v.

THE MITSUI TRUST & BANKING CO., LTD., a foreign corporation; and KAJIMA INTERNATIONAL, INC., a foreign corporation,

Defendants.

ORDER

Appendix G

MITSUI TRUST & BANKING CO., LTD.,

Counterclaimant,

v.

CAROLYN PROPERTIES I, CAROLYN PROPERTIES INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC., and UNIVERSAL CONSULTANTS LTD., CO.,

Counterclaim Defendants.

KAJIMA INTERNATIONAL, INC., a California corporation,

Counter-Plaintiff,

v.

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC., and UNIVERSAL CONSULTANTS LTD., CO.,

Counter-Defendants.

ORDER

THIS CAUSE having come before the Court, on The Mitsui Trust & Banking Co., Ltd.'s ("Mitsui") Motion to Correct a Typographical Error Contained in the Order Affirming Magistrate's Report and Recommendation, dated August 23,

1994 (the "Order"), the Court being otherwise fully advised in the premises, it is hereby

ORDERED, that the Order is modified to reflect that summary judgment is granted in Mitsui's favor on counts IV, VI, and VIII, rather than counts IV, VI and VIII.

DONE AND ORDERED, in Chambers at Miami, Southern District of Florida, this 23rd day of November, 1994.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Guy B. Bailey, Esq.
Scott L. Cagan, Esq.
Michael Olin, Esq.
Darrell Prescott, Esq.
Steven E.M. Hartz, Esq.

APPENDIX H — ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AUGUST 23, 1994

UNITED STATES DISTRICT COURT
OF THE SOUTHERN DISTRICT OF FLORIDA

Case No. 92-2113-CIV-FERGUSON

Carolyn Properties I, a Florida General partnership, Carolyn Properties, Inc., a Florida corp., et al.,

Plaintiffs,

vs.

The Mitsui Trust & Banking Co., Ltd., a foreign corporation and Kajima International, Inc., a foreign corporation,

Defendants.

ORDER AFFIRMING MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on the Motions for Summary Judgment filed by Defendants Kajima International and Mitsui Trust & Banking Co., Ltd.

THE MATTER was referred to the Honorable Ted E. Bandstra, United States Magistrate Judge. A Report and Recommendation dated June 28, 1994 has been filed, making the following recommendations: 1) that Kajima's Motion for Summary Judgment be granted as to Counts VI, VII and VIII,

but denied as to counts V and IX.; 2) that Mitsui's Motion for Summary Judgment be granted on Counts IV, VI and VIII, but denied as to counts I, II, and III; and that 3) Kajima's Motion for Summary Judgment on its Counterclaim be denied. The defendants have filed objections to the Report. The Court has reviewed the pertinent portions of the file, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that United States Magistrate Judge Bandstra's Report and Recommendation of June 28, 1994 is hereby RATIFIED, AFFIRMED and APPROVED in its entirety, and based thereon, Defendants' Objections thereto are OVERRULED and DENIED. **DONE AND ORDERED** in Chambers at Miami, Florida, this 23rd day of August, 1994.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

copies provided:
Guy Burdette Bailey, Jr.
Carolyn T. Ellis
Michael Olin
Steven E.M. Hartz
Luis Miguel O'Naghten
Louis B. Kimmelman
Magistrate Judge Bandstra

APPENDIX I — REPORT AND RECOMMENDATION OF THE UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JUNE 28, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No.: 92-2113-CIV-FERGUSON

CAROLYN PROPERTIES I, a Florida general partnership; CAROLYN PROPERTIES, INC., a Florida corporation; JOIVECA CORPORATION, a Florida corporation; JLP HOLDINGS, INC., a Florida corporation; TK HOLDINGS, INC., a Florida corporation' HHC MIAMI, INC.; and UNIVERSAL CONSULTANTS LTD., CO.,

Plaintiffs,

vs.

THE MITSUI TRUST & BANKING CO., LTD., a foreign corporation; and KAJIMA INTERNATIONAL, INC., a foreign corporation,

Defendants.

THE MITSUI TRUST & BANKING CO., LTD.,

Counterclaimant,

vs.

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC., and UNIVERSAL CONSULTANTS LTD., CO.,

Counterclaim Defendants.

Appendix I

KAJIMA INTERNATIONAL, INC., a California corp.,

Counter-Plaintiff,

vs.

CAROLYN PROPERTIES I, CAROLYN PROPERTIES INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC. and UNIVERSAL CONSULTANTS LTD., CO.,

Counter-Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on (1) Defendant Kajima International, Inc.'s (KII's) Motion for Summary Judgment (D.E. 92) filed on July 19, 1993; (2) Defendant Kajima International's Supplemental Motion for Summary Judgment (D.E. 200) filed on September 21, 1993; and (3) Defendant Mitsui Trust & Banking Co., Ltd.'s (Mitsui's) Motion for Summary Judgment (D.E. 144) filed on July 30, 1993. On January 27, 1994, these motions were referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Wilkie D. Ferguson for a report and recommendation pursuant to 28 U.S.C. § 636(b). Accordingly, the undersigned conducted a hearing on these motions on June 7, 1994. Having carefully considered these motions, all responses and replies thereto, the evidentiary record in this case, and applicable law, the undersigned respectfully recommends:

(a) that KII's Motion for Summary Judgment (D.E. 92) and Supplemental Motion for Summary Judgment (D.E. 200) be GRANTED with summary judgment entered in KII's favor on Counts VI, VII and VIII, but DENIED as to Counts V and IX;

(b) that Mitsui's Motion for Summary Judgment be GRANTED with summary judgment entered in Mitsui's favor on Counts IV, VI and VII but DENIED as to Counts I, II and III;

(c) that KII's Motion for Summary Judgment on its Counterclaim be DENIED.

INTRODUCTION

This is a diversity action for damages initiated by Carolyn Properties I, a Florida partnership, and its partners, the developers of a proposed hotel on Miami Beach, against Mitsui Trust & Banking Company ("Mitsui"), the proposed lender for the hotel project, and Kajima International Co., Inc. ("KII"), a construction contractor which bid on the project. The undisputed evidence in this case[1] reveals that Carolyn Properties I and its partners ("hereinafter plaintiffs") and KII executed a Letter of Intent, dated December 18, 1989, pursuant to which KII was to provide preconstruction services for the project in advance of a possible construction contract to be later entered into by these parties. Among other services, the Letter of Intent required KII to prepare an itemized "Guaranteed Maximum Price" ("GMP") for the construction of the hotel, based on virtually complete working drawings to be prepared by plaintiffs' architects, which was to include all direct and indirect construction costs with certain exceptions including "FF&E" (furniture, fixtures and equipment) items for the project. The Letter of Intent further provided that the contemplated construction contract between KII and plaintiffs would not be

1. This introduction does not, by any means, summarize all undisputed facts in this case. Rather, this introduction is intended only to provide the Court with a brief summary of this case. Additional facts, both disputed and undisputed, are referred to below.

binding on either party until approved and accepted in writing by both parties.

On January 11, 1990, a commitment letter for financing of the hotel was signed by plaintiffs and Mitsui whereby Mitsui agreed to loan $27.0 million to plaintiffs subject to several conditions set forth in the commitment letter. Among other provisions, the commitment letter required that:

> Kajima International, Inc. (the "General Contractor") must provide a guaranteed maximum price contract (including a guaranteed maximum price for all FF&E costs) in form and substance satisfactory to Lender [Mitsui], and for a guaranteed maximum price acceptable to Lender and consistent with the approved Budget.

Among other conditions, the commitment letter also required two Japanese investors, HHC Miami, Inc. ("HHC") and Universal Consultants, Ltd. ("Universal"), to each contribute $2.5 million in equity; a $3.0 million standby letter of credit; and that there be no adverse material change in Carolyn Properties' financial condition prior to closing. The commitment letter provided for an expiration date of July 1, 1990. This expiration date was extended three times in writing with a final written extension date set for October 1, 1990.

Between January and August 1990, plaintiffs provided numerous cost estimates to Mitsui based on partially completed architectural drawings submitted by plaintiffs' architects. On several occasions, KII advised plaintiffs in writing that cost estimates were exceeding plaintiffs' budget of $18.0 million.

Appendix I

On August 28, 1990, KII presented a GMP of $26,857,525, including FF&E, based on 85% complete drawings for the hotel.

On September 21, 1990, plaintiffs advised KII that it would not be retained as the general contractor for the project. No construction contract was ever entered into between plaintiffs and KII or any other party.

On September 23, 1990, plaintiffs advised Mitsui that Carolyn Properties had terminated its relationship with KII and that KII would not be the general contractor for the hotel project. Plaintiffs further advised Mitsui that Turner Construction Company had submitted a cost estimate for the project.

On October 29, 1990, Mitsui advised Carolyn Properties in writing that plaintiffs had not complied with the terms of the commitment letter so that the commitment letter had expired on October 5, 1990. Plaintiffs have arranged for no other financing and the hotel project is not currently underway.

The Lawsuit

On September 7, 1993, plaintiffs filed the instant lawsuit against Mitsui and KII. Plaintiffs' Second Amended Complaint[2] alleges six causes of action against Mitsui, namely, a violation of the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1972 (Count D; breach of contract (Count II); unjust enrichment (Count III); promissory estoppel (Count IV); fraudulent inducement (Count VI); and fraudulent conspiracy (Count VII).

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2. The parties agree that the instant motions for summary judgment are addressed to the second amended complaint filed on September 2, 1993.

Plaintiffs also sues KII in five counts, namely, breach of contract (Count V); fraudulent inducement (Count VI); fraudulent conspiracy (Count VII); promissory estoppel (Count VIII); and tortious interference with advantageous business relations (Count IX).

Both Mitsui and KII have moved for summary judgment in their favor on all counts of the Second Amended Complaint. In addition, KII moves for summary judgment in its favor on its Counterclaim alleging plaintiffs' failure to pay for preconstruction services provided by KII pursuant to the Letter of Intent.

STANDARD OF REVIEW

The court in reviewing a motion for summary judgment is guided by the standards set forth in Rule 56(c) of the Federal Rules of Civil Procedure which provides as follows:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

The moving party bears the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). Further, in addressing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the non-moving party. *Clemens*

v. Dougherty County Ga., 684 F.2d 1365, 1368 (11th Cir. 1982), *citing*, *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608; *Augusta Iron & Steel Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). If the record presents issues of material fact the court must deny the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 157, 90 S.Ct. at 1608. The non-moving party, however, cannot rest upon mere allegations, but must rebut any facts properly presented by the moving party through affidavits or other evidence demonstrating the existence of a genuine and material issue of fact for trial. *Id.* at 398 U.S. 155, 90 S.Ct. at 1607. Moreover, summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986).

ANALYSIS

I. *Mitsui's Motion for Summary Judgment*

A. *Count I: Bank Holding Company Act Violation*

In Count I of the Second Amended Complaint, plaintiffs allege that Mitsui violated the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1972, by conditioning or requiring plaintiffs to use KII as the general contractor for the project. Plaintiffs allege that Mitsui serves as the parent's banker in Japan and in other countries and shares a close relationship with the parent corporation, the Kajima Corporation. Thus, plaintiffs allege that Mitsui's requirement for plaintiff's use of KII as the general contractor for the project was an unlawful "tying arrangement" of a banking service as a condition of the loan.

Second Amended Complaint, ¶¶ 54, 65. Specifically, plaintiffs allege that the close, undisclosed relationship between Mitsui and KII and between Mitsui and the Kajima Corporation "forced plaintiffs to provide additional credit and property to Mitsui" other than that usually provided in connection with a construction loan. Second Amended Complaint, ¶ 53. Finally, plaintiffs allege that Mitsui and KII unreasonably raised the contract bid price and were to share any benefits from the increased price. Second Amended Complaint, ¶¶ 51, 52.

Count I of the Second Amended Complaint is brought under Section 1972(1)(a) and (1)(c) of the BHCA which prohibits a bank from extending credit or furnishing a service on the condition or requirement that the bank's customer obtain from or provide to the lending bank some additional credit, property or service "other than those related to and usually provided in connection with a loan. . . ." Section 1972 was enacted to "prohibit anti-competitive practices which require bank customers to accept or provide some other service or product or to refrain from dealing with other parties in order to obtain the bank product or service they desire." Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970), reprinted in 3 U.S. Code Cong. & Admin. News, pp. 5519, 5535 (1970); *see also Swerdloff v. Miami National Bank*, 584 F.2d 54, 58 (5th Cir. 1978). A tying claim under the BHCA has two elements: "(1) two separate products, a "tying" or "desirable" product and a "tied" or "undesirable" product; and (2) the buyer was in fact forced to buy the tied product to get the tying product; that is, a 'tying'." *Integon Life Insurance Corp. v. Browning*, 989 F.2d 1143, 1150 (11th Cir. 1993). The BHCA is concerned with "tying" conditions, whenever imposed, whereby a bank conditions the extension of credit on the requirement that the borrower provide additional "credit,

property or service" to the lending bank other than those related to and usually provided in connection with a loan. *See McCoy v. Franklin Savings Ass'n,* 636 F.2d 172, 175 (7th Cir.1980); *Peterson v. Wells Fargo Bank,* 556 F.Supp.1100, 1107 (N.D. Cal.1981).

Here, plaintiffs argue that Mitsui violated the anti-tying provisions of the BHCA by requiring plaintiffs to use KII as the general contractor for the hotel project as a requirement for the construction loan. In a similar context, the Fifth Circuit Court of Appeals has already determined that a bank's requirement for a builder's use of a particular contractor as a condition for a construction loan violates the BHCA. *See Dibidale of Louisiana v. American Bank and Trust Co.*, 916 F.2d 300 (5th Cir. 1990) (borrower, which alleged that its hiring of customer of affiliated bank as a contractor was "condition or requirement" of its obtaining loan from lending bank, stated cause of action against lending and affiliated banks under the anti-tying provisions of the BHCA). Here, as in *Dibidale*, plaintiffs present evidence that Mitsui required plaintiffs to use KII as the general contractor for the hotel and refused to extend construction financing to plaintiffs once KII was no longer being considered as the general contractor.[3]

Mitsui argues forcefully for the dismissal of the BHCA claim on the ground that plaintiffs and not Mitsui first proposed KII as the general contractor and negotiated for KII as the general

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3. Plaintiffs primarily rely on evidence of Mitsui's statement made to Carolyn Properties, once it learned that KII was no longer the general contractor, to "use Kajima or you're not going to build the project." Additional evidence establishing this "tying" condition includes the recollection of a third-party broker with knowledge that Mitsui insisted on plaintiffs' use of KII as the general contractor for the project.

contractor in the commitment letter. Alternatively, Mitsui argues from facts in the record that Mitsui refused to make the loan because plaintiffs had not met other essential terms of the commitment letter relating to, among other things, the escrow account, letter of credit and financial condition of Carolyn Properties. Mitsui's first argument would not defeat the BHCA claim because that statute is concerned with conditions, *whenever imposed,* not normally related to a bank's extension of a loan. *See McCoy, supra*, 636 at 175 (the BHCA is "concerned with the kind of conditions required, regardless of when they are imposed"); *Peterson, supra*, 556 F.Supp. at 1107 ("the fact that the customer agrees with the term at the outset does not necessarily take the agreement out of the Tie-In Act"). Thus, while Mitsui may have initially agreed to plaintiffs' request to use KII as the general contractor, as indicated by the commitment letter, Mitsui's later requirement for KII as the general contractor would constitute a violation of the BHCA if plaintiffs can later prove that Mitsui refused financing for the hotel project based solely on plaintiffs' failure to use KII as the general contractor for the project. Conversely, Mitsui's alleged insistence on KII might not violate the BHCA if Mitsui proves at trial that it refused financing due to plaintiffs' failure to meet other "normal" conditions for the loan. At this point, the undersigned finds evidence in support of both possibilities.

Mitsui also argues the inapplicability of the BHCA to this case on the ground that its insistence for KII as the general contractor, even if true, was not a requirement or a condition for "credit, property or service" to Mitsui as the lending bank. Plaintiffs respond with evidence revealing close business ties between Mitsui and KII, and Mitsui's financial interest in this general contractor and its parent corporation. Specifically, plaintiffs establish that Mitsui owned corporate stock of the

Kajima Corporation when the commitment letter was signed, and that the Kajima Corporation owned corporate stock in Mitsui at that same time. In addition, the record reveals that the Kajima Corporation, KII's parent, owed Mitsui about $16.0 million when the loan commitment was signed; and that KII itself was obligated to repay a $10.0 million loan to Mitsui at that time. From this evidence, plaintiffs argue that Mitsui stood to benefit from plaintiffs' use of KII as the contractor for the project. Under the BHCA, evidence of even an indirect benefit to a bank for an additional and unusual requirement placed on a bank customer in connection with a loan is sufficient to defeat summary judgment in that bank's favor. *See Swerdloff, supra,* 584 F.2d at 59 ("where there is a requirement of unusual service, at least an indirect benefit to the bank will be inferred upon a motion for summary judgment").

Finding material facts in dispute concerning Mitsui's alleged insistence that plaintiffs use KII as the general contractor for the project, and further finding material facts in dispute concerning the actual reason for Mitsui's decision not to make this loan, the undersigned recommends that Mitsui's motion for summary judgment on the BHCA claim be denied.

B. *Count II: Breach of Contract Claim*

In Count II, plaintiffs sue Mitsui for breach of contract of the written commitment letter by failing to finance the construction project, and for breach of Mitsui's implied obligation of good faith and fair dealing under that agreement by, *inter alia,* failing to disclose its relationship with KII and by unreasonably refusing to allow plaintiffs to use Turner Construction Company as a substitute contractor for the project. Second Amended Complaint, ¶¶ 57-59. Mitsui moves to dismiss

the breach of contract claim arguing plaintiffs' failure to perform numerous conditions precedent specified in the commitment letter including (1) plaintiffs' failure to have KII as the general contractor; (2) plaintiffs' failure to have any general contractor under contract at the time of closing; (3) plaintiffs' failure to submit a proposed contract from a contractor with a guarantee maximum price within the budget; and (4) plaintiffs' failure to maintain an escrow account and cash equity in an escrow account as stated in the commitment letter.

Plaintiffs respond by arguing that Mitsui wrongfully and retroactively terminated the commitment letter prior to its extended date of November 1, 1990 and, in so doing, at least partially prevented plaintiffs from fulfilling conditions of the commitment letter. In addition, plaintiffs argue that Mitsui breached its loan commitment with them by (1) insisting that KII serve as the general contractor; (2) engaging in unauthorized and undisclosed communications with KII concerning plaintiffs' loan which prevented them from obtaining a reasonable GMP from KII; (3) insisting that KII purchase furniture for the hotel thereby increasing the costs of the project; (4) imposing additional, onerous conditions on plaintiffs once KII was no longer the anticipated contractor; and (5) by making false promises and/or by failing to disclose material facts to plaintiffs concerning Mitsui's relationship with KII.

Reviewing the record, the undersigned finds material facts in dispute concerning KII's alleged failure to fulfill conditions precedent under the commitment letter, and concerning Mitsui's alleged breach of that commitment letter. Regarding the former, the undersigned has already found that Mitsui could not have insisted on KII as the contractor without violating the BHCA. Thus, plaintiffs' inability to obtain a GMP from KII within the

budget would not constitute a failure to fulfill a condition precedent in the commitment letter.

Mitsui's position regarding plaintiffs' alleged failure to perform other conditions precedent, including its presentation of a GMP from a contractor, establishment of an escrow account with specified equity and plaintiffs' satisfaction of other conditions of that contract, hinge largely on whether the deadline for meeting those conditions was extended beyond October 1, 1990. Mitsui correctly notes that this deadline had been extended in writing only until October 1, 1990. Plaintiffs were clearly unable to meet requirements of commitment letters by that date due to several reasons including its inability to reach contract terms with KII. Plaintiffs present evidence, however, of an oral extension of the commitment letter deadline to November 1, 1990, and of Mitsui's cancellation of the commitment letter prior to that time. Reviewing this evidence, the court must be mindful of Florida's statute of frauds which provides that a debtor may not maintain an action on a credit agreement unless the agreement is in writing and is signed by the creditor and debtor. Fla.Stat. § 687.0304(2). Mitsui relies not only on this statute but also on the commitment letter itself which provided that any extension of its expiration date must be in writing.

Plaintiffs argue that the October 1 deadline was extended orally by Mitsui and that this oral extension to November 1, 1990 was valid and enforceable notwithstanding the statute of frauds and the requirement for written extension of the deadline of this case. Specifically, plaintiffs argue from evidence in the record that Mitsui orally extended the commitment letter deadline to November 1 as indicated in an internal report submitted by Mitsui to its Tokyo headquarters on October 26, 1990. Plaintiff

also argue that Mitsui advised plaintiff's mortgage broker that the October 1 deadline was "not of consequence" which the broker confirmed in writing with Mitsui on October 9, 1990. Plaintiff further argues that it relied on Mitsui's oral promise of an additional 30-day extension, until November 1, 1990, and never heard otherwise from Mitsui until they received the "expiration letter" dated October 29, 1990 advising plaintiff of a "retroactive" expiration date of October 5, 1990.

Reviewing the factual record and applicable law, the undersigned finds material facts in dispute concerning Mitsui's alleged oral extension of the October 1 deadline and Mitsui's possible waiver of that deadline. Florida law generally prohibits oral modifications of agreements required to be in writing by the statute of frauds. *See United of Omaha Life Insurance Co. v. Nob Hill Associates,* 450 So.2d 536, 539 (Fla. 3d DCA 1984). However, a party to such agreement can be estopped from disclaiming an oral modification if the other party acts in reliance on that oral modification. *Id., see also Wilson v. Woodward,* 602 So.2d 547, 549 (Fla. 2d DCA 1992) ("In addition to modifying a contract by oral agreement under certain circumstances, a contract can also be modified by conduct which would render a fraud upon one party for the other party to refuse to perform the alleged oral modification"). In this case, plaintiffs present evidence of an oral modification extending the October 1 deadline to November 1, 1990; and of their reliance on that oral extension in attempting to meet the conditions established by the commitment letter. Under these circumstances, the Court should not now conclude that Florida's statute of frauds bars the alleged oral extension of the October 1 deadline.

Having found a jury question with respect to the applicable deadline, the undersigned finds facts in dispute concerning

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Mitsui's alleged breach of contract as alleged in Count II. Specifically, the undersigned finds material issues of fact with respect to whether Mitsui breached the commitment letter by prematurely terminating that agreement; insisting on plaintiffs' use of KII as the general contractor; and by communicating with KII prior to the termination date.

Accordingly, the undersigned also recommends that plaintiffs' motion for summary judgment on Count II be denied.

C. *Count III: Unjust Enrichment*

In Count III, plaintiffs allege that they paid Mitsui $135,000, representing one-half of the commitment fee under the loan commitment; that Mitsui has not fulfilled its obligations to lend plaintiffs $27.0 million; and that Mitsui never returned the commitment fee despite their repeated demands. Plaintiffs allege that they were deprived the benefit of their bargain and, therefore, request damages including the return of the commitment fee on the ground that it would be inequitable for Mitsui to retain the fee.

Mitsui moves for summary judgment on this count on the ground that plaintiffs agreed in writing that the commitment fee was nonrefundable. Additionally, Mitsui argues that plaintiffs received value for their payment, i.e., the privilege of having funds held available for over eight months for later borrowing upon plaintiffs' satisfaction of conditions precedent in the commitment letter.

Plaintiffs respond by referring to evidence in support of their breach of contract and BHCA claims which, plaintiffs argue, supports their unjust enrichment claim.

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Having already found facts in dispute preventing summary judgment in Mitsui's favor on the breach of contract and BHCA claims, the undersigned finds the same facts relevant to the unjust enrichment claim. While the commitment letter was in writing and clearly provided that the commitment fee was nonrefundable, the enforceability of that writing hinges on whether Mitsui breached the commitment letter and in what manner. Likewise, Mitsui's position that plaintiffs have "unclean hands" and, therefore, are entitled to no equitable relief is also a jury question at this time.

Accordingly, the undersigned recommends that Mitsui's request for summary judgment on Count III be denied.

D. *Count IV: Promissory Estoppel*

In Count IV of the Second Amended Complaint, plaintiffs seek damages under a promissory estoppel theory alleging that Mitsui, in its written loan commitment, promised to lend plaintiffs $27.0 million; that Mitsui should have reasonably expected to induce action and forbearance on plaintiffs' part; and that Mitsui's promise did, in fact, induce action by plaintiffs who spent approximately $2.3 million preparing to construct the hotel. Plaintiffs seek compensatory and other damages resulting from their reliance on Mitsui's unfulfilled promise.

Mitsui moves to dismiss the count on the ground that the written commitment letter between these parties bars plaintiffs' promissory estoppel claim. In essence, Mitsui argues that its alleged promise to lend $27.0 million is the same "promise" contained in the written commitment letter, albeit with conditions, and that any attempt by plaintiffs to use a promissory estoppel theory to avoid enforcement of those conditions would

nullify the operation of Florida's statute of frauds which enforces only written credit agreements.

Reviewing the count and applicable law, the undersigned finds that plaintiffs cannot rely on a promissory estoppel theory to recover their alleged damages. In *W.R. Grace and Co. v. Geodata Services,* 547 So.2d 919 (Fla. 1989), the Supreme Court of Florida explained the principles of promissory estoppel as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise . . . and which does induce such action or forbearance . . . is binding if injustice can be avoided only by enforcement of the promise. . . .

547 So.2d at 924 (citing Restatement (Second) of Contracts § 90 (1979)). Florida courts have consistently held that the law will not imply or create a contract from controverted verbal exchanges where a valid contract exists. *Dick Winning Chrysler-Plymouth of Ft. Myers. Inc. v. Chrysler Motor Corp.,* 750 F.2d 895, 900 (11th Cir. 1985) ("Winning Chrysler's reliance on a verbal or implied contract, in light of the existence of a valid written contract, is misplaced"); *see also Hermanowski v. Naranja Lakes Condominium No. Five. Inc.,* 421 So.2d 558, 560 (Fla. 3d DCA 1982). Application of promissory estoppel has been held to be particularly inappropriate to avoid the statute of frauds or to create an obligation based on an oral representation where a written contract is a prerequisite to an action in certain transactions. *See Coral Way Properties. Ltd. v. Roses,* 565 So.2d 372, 374 (Fla. 3d DCA 1990).

Here, plaintiffs argue promissory estoppel based on the very same "promise" to lend money made by Mitsui in the written

loan agreement. Mitsui is correct when it notes that its written promise, however, was premised on a series of conditions stated in that agreement. Allowing plaintiffs to proceed on a promissory estoppel theory which, in any way, contradicts the written loan agreement would be unjust to Mitsui and would wrongfully create a contractual obligation or right based on an oral representation in violation of Florida's statute of frauds. *See* Fla.Stat. § 787.0304.

Accordingly, plaintiffs promissory estoppel claim should be dismissed as a matter of law due to the written contract between these parties.

E. *Count VI: Fraudulent Inducement*

Plaintiffs, in Count VI in the Second Amended Complaint, allege that Mitsui promised to lend $27.0 million to plaintiffs and to cooperate with them in consummating the construction loan. Second Amended Complaint, § 79. Plaintiffs further allege that Mitsui fraudulently induced plaintiffs into entering that written loan agreement while intending, together with KII, to raise KII's bid price above the actual construction costs of the project. Plaintiffs further allege that Mitsui knew at that time but failed to disclose that it would not make a loan to plaintiffs without KII serving as the general contractor. Mitsui allegedly knew its representations were false but made them to induce plaintiffs to execute the commitment letter. Plaintiffs allege their reliance on Mitsui's promises and their damages resulting therefrom when the loan was never made.

Mitsui moves for summary judgment on this count on the basis of Florida's economic loss rule and the lack of any evidence supporting the fraud charge. Regarding the former,

Mitsui argues that this tort claim alleges only economic damages which mirror those damages sought in the breach of contract claim. As to the evidence, Mitsui argues its alleged failure to disclose its intent to insist on KII as general contractor is belied by the commitment letter itself which required KII to submit a guaranteed maximum price to build the hotel.

Addressing the legal issue first, the undersigned does not find that plaintiffs' fraudulent inducement count is barred by Florida's economic loss rule. Generally, this rule prohibits recovery in tort where parties are contractually related with a written agreement detailing their respective obligations. *See Florida Power & Light Co. v. Westinghouse Electric Corp.*, 510 So.2d 899 (Fla. 1987). This rule is based on the principle that "contract principles are more appropriate than tort principles for resolving economic losses." *Id.* at 901; *see also Casa Clara Condominium Ass'n v. Charley Toppino & Sons. Inc.*, 620 So.2d 1244 (Fla. 1993). However, the economic loss rule does not bar a tort which is independent of the breach of contract. *See Williams Electric Co., Inc. v. Honeywell. Inc.*, 772 F.Supp. 1225, 1237 (N.D. Fla. 1991) (citing *AFM Corp. v. Southern Telephone & Telegraph Co.*, 515 So.2d 180 (Fla. 1987)). Fraud in the inducement of a contract has been recognized as an independent tort based on pre-contractual conduct not associated with actual performance of the contract itself. *Id.* at 1238.

Here, plaintiffs allege Mitsui's fraud in inducing plaintiffs to enter into the loan agreement based on Mitsui's alleged intent, prior to execution of the commitment letter, to execute that contract and to later insist on KII as the general contractor. Despite a diligent search, the undersigned finds no evidence of any such intent on Mitsui's part or of any pre-contractual conduct by Mitsui which supports the claim. The evidence is undisputed

that plaintiffs, not Mitsui, first proposed KII as the general contractor for the project. Plaintiffs' evidence concerning Mitsui's post-contractual insistence on KII as the general contractor lends no support for the pre-contractual tort of fraud in the inducement. Also, plaintiffs present no evidence of any meeting, correspondence or communications between Mitsui and KII prior to the execution of the commitment letter. Thus, plaintiffs' proof of joint conduct by defendants prior to execution of the commitment letter is purely conjectural and without factual support. Also, plaintiffs' evidence concerning a pre-existing business relationship between Mitsui, KII and the Kajima Corporation is insufficient to raise a material issue of fact concerning Mitsui's alleged intent with respect to the project and the loan commitment executed by these parties. Finally, and most importantly, the very same conduct argued in support of this count, including Mitsui's alleged communications with KII and alleged conspiracy to deprive plaintiffs of the benefits of its contracts with both defendants, is the same conduct giving rise to the breach of contract claims and forms the basis for the very same damages resulting from those alleged breaches. Under Florida Law, compensatory damages recovered under a breach of contract may not be used as the underlying basis for an award of punitive damages under a separate tort count. *Rolls v. Bliss & Nyitray, Inc.*, 408 So.2d 229, 237 (Fla. 3d DCA 1982); *Rosen v. Marlin*, 486 So.2d 623, 626 (Fla. 3d DCA 1986) ("Where the compensatory damages requested in a count for tort are identical to the compensatory damages sought in a count for breach of contract, compensatory damages and punitive damages are not recoverable"). Here, plaintiffs seek the same compensatory damages in both their breach of contract and fraudulent inducement counts. Under Florida law, such damages are not recoverable in tort and will not support an award of punitive damages.

Accordingly, the undersigned recommends summary judgment in Mitsui's favor on the fraudulent inducement claim.

E. *Count VII: Fraudulent Conspiracy*

Finally, Mitsui moves to dismiss the fraudulent conspiracy count alleged in Count VII of the Second Alleged Complaint. In this count, plaintiffs allege that Mitsui and KII "met clandestine and collaborated to increase the price of the project" in order to share benefits from the increased price to force plaintiffs' abandonment of the project. Second Amended Complaint, ¶ 90. Plaintiffs further allege that Mitsui and KII conspired together to raise the price of the project or agreed to an unreasonably high bid from KII because they knew that Mitsui would not finance the project unless KII was the contractor.

Mitsui moves to dismiss the count under Florida's economic loss rule and because no evidence supports the claim.

Reviewing this count and applicable law, the undersigned finds it clearly barred by the economic loss rule. This count, unlike plaintiffs' fraudulent inducement claim, is based solely on allegations of misconduct by Mitsui and KII occurring after execution of the contracts involving those parties and on many of the same alleged facts comprising the breach of contract claims. Thus, this conspiracy claim is not an independent tort arising out of alleged conduct which is separate and apart from the contract claims. Plaintiffs, in this conspiracy count, do not claim personal injury or property damage which might give rise to a cognizable claim apart from the contract claim. *See AFM Corp., supra,* 515 So.2d at 181 ("without some conduct resulting in personal injury or property damage, there can be

no tort flowing from a contractual breach which would justify a tort claim for economic damages").

Plaintiffs, in support of the count, argue that a civil conspiracy claim was not barred by the economic loss rule in *Greenberg v. Mt. Sinai Medical Center of Greater Miami, Inc.*, 629 So.2d 252 (Fla.3d DCA 1993). While *Greenberg* stands for the proposition that not all claims for civil conspiracy are necessarily barred by the economic loss rule, that decision cannot be read to allow for all civil conspiracy torts combined with breach of contract claims. Here, the conspiracy alleged against Mitsui and KII clearly rests on allegations identical or nearly identical to those alleged in the breach of contract claims and are based on alleged actions by both defendants integrally related to the contract claims and the economic loss allegedly suffered by plaintiffs in this case.

Accordingly, the undersigned recommends summary judgment in Mitsui's favor on the civil conspiracy claim under Florida's economic loss rule.

II. *KII's Motion for Summary Judgment*

Plaintiffs also sue KII, the anticipated general contractor, for its alleged role resulting in plaintiffs' failure to submit a GMP contract and meet other conditions of the commitment letter with Mitsui. Plaintiffs primarily focus their claims against KII on the Letter of Intent agreement executed by these parties on April 18, 1989, and on KII's alleged activities involving Mitsui following execution of that agreement.

A. *Count V: Breach of Contract*

Plaintiffs first count against KII is for breach of contract in which plaintiffs allege that KII breached the Letter of Intent by,

inter alia, failing to commence "value engineering"[4] in a timely manner; failing to devote appropriate manpower for the project; failing to timely contact appropriate subcontractors; "burying" costs of the project; and by meeting with Mitsui to privately discuss terms of plaintiffs' commitment letter. Second Amended Complaint, ¶ 74. Additionally, plaintiffs infer, without actually alleging, that KII breached the Letter of Intent by failing to timely advise plaintiff of increases in the project's cost, failing to act in good faith to lower the costs of the project, and by holding undisclosed and unauthorized meetings with Mitsui during the contract period. Second Amended Complaint, ¶ 73.

KII moves for summary judgment on the breach of contract claim on the grounds that it completely fulfilled the terms of the Letter of Intent, and because plaintiffs can show no damages attributable to KII resulting from its alleged breach. In addition, KII argues that a "hold harmless" clause in the Letter of Intent, completely absolves KII from all liability regardless of any breach on his part.

Evaluating KII's position and plaintiffs' opposition thereto, the undersigned agrees with KII that the Letter of Intent establishes the relationship between these parties and determines their respective duties and responsibilities. Thus, this letter agreement clearly establishes KII's duties to provide preconstruction services to plaintiffs which included KII's review of plans and specifications prepared by plaintiffs' architects; consultation and procurement of cost estimates for construction; and notice to plaintiffs whenever the estimated costs for the project exceeded 18.0 million. In addition, the Letter of Intent

4. The parties explained that "value engineering" is a phrase used to reflect cost cutting measures suggested by a contractor to lower the construction costs of a building project.

requires KII to provide a guaranteed maximum price for the construction of the project based on drawings prepared by the architects and to provide cost analysis and cost savings by value engineering.

Plaintiffs allege specific breaches of these contractual duties as itemized above. Reviewing the record, the undersigned finds material facts in dispute concerning KII's performance under the Letter of Intent. While plaintiffs appear to drift from that written agreement in opposing certain obligations on KII (e.g., KII was not to meet or communicate with Mitsui; KII was to submit a reasonable GMP within plaintiffs' budget; and KII was required to disclose its business relationships with Mitsui), plaintiffs also present evidence concerning KII failure to perform specific preconstruction services clearly required under the Letter of Intent itself. Thus, plaintiffs allegation that KII failed to timely perform value engineering is supported by deposition testimony of third parties and other evidence indicating that KII failed to fulfill preconstruction obligations under the contract. Plaintiffs note and the undersigned finds that plaintiffs' architectural firm also observed that KII appeared to lack knowledge, background and involvement with appropriate subcontractors; and blamed KII for escalating costs and a GMP beyond the budget. Plaintiffs also cite evidence of KII's acknowledgment of scheduling delays due to KII and its need to speed up their work.

KII, in response to this evidence, blames plaintiffs for increasing the scope of the project and for failing to curtail their architects. Material facts supporting this dispute between the parties preclude summary judgment on the breach of contract claim. Additionally, evidence concerning KII's lack of hotel construction experience, inadequate staffing for the project, and failure to obtain reasonable bids from subcontractors also bars summary judgment at this time.

KII also argues for summary judgment, despite any factual disputes, on the basis of the "hold harmless" clause in the Letter of Intent, and because no breach on their part was the proximate cause of plaintiffs' alleged damages. The Letter of Intent provides in part that:

> Should Owner reject the proposed Contract or should the parties not otherwise sign the proposed Contract for any reason, by the Expiration Date (as hereinafter defined), Owner shall reimburse KII for its actual costs for performing preconstruction services (such costs shall not exceed $100,000.00) from the date hereof to the date of rejection by Owner or to the Expiration Date, as the case may be, *and shall hold KII harmless from any liability,* loss, costs, claim or expense including attorneys fees (emphasis added)

KII argues that this clause releases it from all liability to plaintiffs in this case. Plaintiffs argue in opposition that this clause refers only to the their potential liability to third parties as a result of preconstruction services provided by KII. While interpretation of a contact is a matter of law for the Court to decide, the undersigned finds logical support for both interpretations suggested by the parties. Thus, the undersigned finds that this decision must be reserved for ruling following the submission of evidence at trial.

Likewise, the undersigned finds that the Court cannot presently determine, on the basis of undisputed facts, whether all or a portion of plaintiffs' alleged damages were or were not proximately caused by KII's alleged breaches of the Letter of Intent. In essence, KII argues from evidence in the record that

plaintiffs have failed to meet several conditions precedent set forth in the commitment letter so any breach by KII could not possibly have caused Mitsui to refuse to make the construction loan. The undersigned has found above that material issues of fact preclude summary judgment in Mitsui's favor under the commitment letter. Most importantly, material facts are in dispute concerning Mitsui's alleged insistence on KII as the general contractor for the project so that any breach by KII of its contractual duties which prevented plaintiffs from executing a construction contract with KII may well have resulted in at least a portion of plaintiffs' damages on the breach of contract claim.

Accordingly, the undersigned finds that KII is not entitled to summary judgment on the breach of contract claim.

B. *Count VI: Fraudulent Inducement*

In Count VI, plaintiffs sue KII for fraudulent inducement based on KII's alleged promise not to exceed the budget and repeated assurances to plaintiffs that it would complete the project within the budget. Plaintiffs allege that KII knew "at the time it contracted with plaintiffs" that it would raise the bid at a later time. Plaintiffs further allege that KII and Mitsui agreed from the outset to raise the bid price above actual construction costs knowing that plaintiff would have no choice but to accept KII's inflated bid. Plaintiffs also allege that KII (and Mitsui) knew its representations regarding completion of the project within the budget were false when made; and that KII had no intent to honor those representations. Finally, plaintiffs allege KII's intent to induce their reliance on those false representations and that they did, in fact, rely to their detriment by signing the Letter of Intent.

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KII moves to dismiss this tort count under Florida's economic loss rule, and because plaintiffs have no evidence to support the claim. As a matter of law, the undersigned again finds that the economic loss rule does not bar plaintiffs' fraudulent inducement count because this count, as alleged, is independent from the breach of contract claim. *See Williams Electric, supra,* 772 F.Supp. at 1237-38 (a fraudulent inducement count is not barred by the economic loss rule because such a claim is based on pre-contractual conduct). Here, KII alleges fraudulent conduct proceeding the execution of the Letter of Intent which was intended to induce the signing of that contract.

Turning to the evidence, however, the undersigned finds no factual support for this claim. Plaintiffs attempt to create a factual dispute by arguing, without reference to the record, that KII Misrepresent[ed] the nature and extent of services that KII would provide." KII memorandum, pg. 30. Misrepresentations of preconstruction services, however, is not alleged in the count. Rather, plaintiffs allege that KII misrepresented that it would submit a bid within a budget of $18.0 million. No deposition testimony, documents or other evidence is cited in support of that contention. In fact, KII's initial proposal for services, submitted to plaintiffs prior to the Letter of Intent, makes no such representation and states only that KII would "monitor the progress of the design, and immediately flag any deviation from the conceptual estimation [of $17.8 million] resulting from each issue of the drawings and specifications." Plaintiffs offer no other document, deposition or other evidence supporting its allegations and argument that KII induced plaintiff into signing the Letter of Intent "by misrepresenting that it could build the [project] for $17.8 million." KII's response, pg. 30.

In short, the undersigned finds no evidence in support of plaintiffs' fraudulent inducement count; and further finds that plaintiffs' argument in support of the count focuses only KII's failure to provide preconstruction services which is the subject matter of their breach of contract claim.

Accordingly, the undersigned recommends summary judgment in KII's favor on the fraudulent inducement count.

C. *Count VII: Fraudulent Conspiracy*

Plaintiffs next allege, in Count VII of the Second Amended Complaint, that Mitsui and KII fraudulently conspired to increase the price of the project and to "share the benefits of the increase" when both defendants knew that plaintiffs would have to accept KII's bid due to Mitsui's insistence on KII as general contractor. Plaintiffs allege that this concerted action by Mitsui and KII was designed to accomplish an unlawful purpose through unlawful means and was carried out by both defendants causing their damages.

The undersigned has already addressed this count above with respect to Mitsui's motion for summary judgment and has found the count barred by Florida's economic loss rule. Here, unlike the fraudulent inducement count, plaintiffs rely on allegations of post-contractual conduct by both defendants which is not separate and independent from the breach of contract claims. In fact, plaintiffs' breach of contract claims against both defendants rely, in many respects, on the very same allegations of collusion between Mitsui and KII.

Moreover, plaintiffs fail to allege or show any damages resulting from defendants' alleged conspiracy that are distinct

from damages allegedly resulting from the breach of contract claims. *See Rolls v. Bliss & Myitray, supra; Rosen v. Marlin, supra.*

Accordingly, the undersigned recommends that summary judgment be granted in KII's favor on the fraudulent conspiracy count under Florida's economic loss rule.

D. *Count VIII: Promissory Estoppel*

Penultimately, KII moves for summary judgment on plaintiffs' promissory estoppel claim alleged in count VIII. In this count, plaintiffs allege that KII was obligated to perform specific preconstruction services under the Letter of Intent including delivery of a GMP; that KII orally promised plaintiffs on numerous occasions that its proposed bid at the 50% drawing stage would be within 10% of its final GMP; that KII's oral promises reasonably induced plaintiff to spend approximately $2.3 million in preparing for construction of the hotel; and that KII's GMP ultimately submitted in the amount of $26.8 million caused damages in excess of $2.3 million due to KII's unfulfilled promise. Second Amended Complaint, ¶ ¶ 96-98.

KII moves for summary judgment on this count as a matter of law because it implies an obligation not contained in the written agreement (Letter of Intent) entered into by these parties. In addition, KII moves for summary judgment because the count is based on a promise of a future act, namely, submission of a GMP within 10% of an earlier estimate, and because plaintiffs have not alleged and cannot prove reasonable reliance on this oral promise. Finally, KII moves for summary judgment on the count because plaintiffs fail to present factual evidence in support of the claim.

Reviewing the record, the undersigned finds insufficient evidence for such a oral promise alleged in this count and that plaintiffs could not have reasonably relied on such a promise under the circumstances of this case. While claiming that the "record is replete with evidence that KII *repeatedly promised* plaintiffs that its GMP would be within 10 percent of its 50 percent drawings estimate," plaintiffs offer no actual evidence of such a promise. For promissory estoppel to be applied, the evidence must be clear and convincing. *W.R. Grace, supra,* 477 So.2d at 925. Even assuming evidence of such "promise," Florida law will not imply or create a contractual obligation from controverted verbal exchanges where a valid written contract exists. *Dick Winning Chrysler, supra,* 750 F.2d at 900. A valid written agreement exists here setting forth the duties and responsibilities of these parties. Thus, plaintiffs' reliance upon a verbal promise not found in the written agreements is misplaced. In addition, the undersigned finds that the application of the promissory estoppel doctrine is not needed here to prevent an injustice and could, just as easily, create an injustice by altering the written agreement between these parties.

Accordingly, plaintiffs' promissory estoppel claim against KII should also be dismissed as a matter of law.

E. *Count IX: Tortious Interference*

Finally, KII moves for summary judgment on plaintiffs' tortious interference claim, (Count IX) in which plaintiffs allege that KII, after being informed that it would it not be the general contractor, "deliberately and successfully caused Mitsui to reject plaintiffs' use of Turner as the contractor for the project." Second Amended Complaint, ¶ 101. Specifically, plaintiffs allege that KII, in a written communication with Mitsui "warned" Mitsui

that Turner's proposal was unreliable, and urged Mitsui not to loan construction funds to plaintiffs unless they agreed to use KII for the project. *Id.*

KII moves to dismiss the tortious interference count on several grounds. First, KII argues that the count is specious because plaintiffs have no evidence of KII's actual interference with a business relationship between plaintiffs and Mitsui. Second, KII argues that the count is barred by the economic loss rule because plaintiffs allege only economic damages in the count. Third, KII argues that the count is barred because KII was a party to the business relationship allegedly interfered with, and because KII's alleged statements to Mitsui were privileged as statements made to safeguard their own financial economic interests. Finally, KII argues, as it had before, that this tort, too, is barred because it seeks no damages separate and apart from those resulting from the breach of contract claim.

Reviewing the facts, the undersigned first finds evidence of at least one communication between KII and Mitsui, after KII was rejected as the general contractor for the project, which might be viewed by a jury as interference with plaintiffs' business relations with Mitsui. Plaintiffs, in factual support of their claim, rely primarily on a memorandum written by KII to Mitsui, after KII was no longer under consideration, in which KII expressed its concern about the cost estimate submitted by Turner and warned Mitsui about relying on that estimate. While the parties dispute the impact of this memorandum, the undersigned finds that Mitsui may have been influenced by KII's concern so that this communication might constitute "interference" when viewed in the full context of this case.

Turning to KII's legal arguments, the undersigned finds that this tortious interference is not barred by Florida's economic

loss rule. Florida courts have consistently held that a plaintiff can combine breach of contract and tortious interference counts in a single case without violating the economic loss rule so as long as the alleged interference is independent from the breach of contract claim. *See e.g., Greenberg, supra; AFM Corp., supra,* 515 So.2d at 181. Here, KII's interference allegedly occurred after the termination of the contractual relationship between plaintiffs and KII. In addition, this tort claim is based on events allegedly unrelated to obligations stated in the Letter of Intent.[5]

Lastly, the undersigned does not find that plaintiffs' tortious interference counts is barred by their failure to allege damages separate and apart from the breach of contract claims. As stated above, a plaintiff may not recover damages in tort including punitive damages based solely on allegations of conduct constituting a breach of contract. This principle, however, does not preclude plaintiffs from seeking damages for tortious interference as an alternative theory for relief. Also, plaintiffs' alleged damages on the tortious interference count apparently result from damages allegedly incurred after KII was notified of plaintiffs' attempt to execute a construction contract with Turner. While plaintiffs have yet to prove their damages, evidence in the record supports their position that such damages would not necessarily mirror those damages claimed in the breach of contract claim.

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5. For this reason, also, the undersigned finds that plaintiffs' tortious interference claim is not barred as a matter of law due to any ongoing business relationship between KII and Mitsui at the time the statement was allegedly made and/or because KII was somehow privileged in communicating with Mitsui because of its previous efforts to secure a construction contract. Facts are clearly in dispute as to whether KII's alleged communication with Mitsui was for a legitimate business purpose or intended to interfere with plaintiffs' possible use of Turner as the contractor for the project.

Accordingly, the undersigned recommends that KII's motion for summary judgment on the tortious interference count be denied.

III. *KII's Counterclaim*

As indicated above, KII also seeks summary judgment in its favor on its Counterclaim in which KII seeks damages on several theories for plaintiffs' alleged failure to pay KII for preconstruction services provided under the Letter of Intent. While the parties do not dispute that plaintiffs have withheld such payment, facts are in dispute over whether KII fully provided all preconstruction services required under the Letter of Intent.

Accordingly, the undersigned also recommends that KII's motion for summary judgment on its Counterclaim be denied.

RECOMMENDATION

For all of the foregoing reasons the undersigned respectfully recommends:

(a) that KII's Motion for Summary Judgment (D.E.92) and Supplemental Motion for Summary Judgment (D.E. 200) be GRANTED with summary judgment entered in KII's favor on Counts VI, VII and VIII, but DENIED as to Counts V and IX;

(b) that Mitsui's Motion for Summary Judgment be GRANTED with summary judgment entered in Mitsui's favor on Counts IV, VI and VIII but DENIED as to Counts I, II and III;

(c) that KII's Motion for Summary Judgment on its Counterclaim be DENIED.

Appendix I

The parties may serve and file written objections to this Report and Recommendation with the Honorable Wilkie D. Ferguson, Jr., United States District Judge, within ten (10) days of receipt. *See* 28 U.S.C. §636(b)(1)(C); *United States v. Warren*, 687 F.2d 347 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983); and *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. Unit B 1982); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED in Miami, Florida, this 28th day of June, 1994.

s/ Ted E. Bandstra
TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Honorable Wilkie D. Ferguson, Jr.
All counsel of record

APPENDIX J — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 17, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-4484

CAROLYN PROPERTIES I, a Florida general partnership, CAROLYN PROPERTIES, INCORPORATED, a Florida corporation, et al.,

Plaintiffs-Counter-Defendants-Appellants,

HHC MIAMI, INC.,

Plaintiff-Appellant,

versus

MITSUI TRUST & BANKING COMPANY, LIMITED, a foreign corporation, KAJIMA INTERNATIONAL, INCORPORATED, a foreign corporation,

Defendants-Counter-Claimants-Appellees.

On Appeal from the United States District
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion_____, 11th Cir., 19__, _____F.2d_____).

Appendix J

Before: CARNES, Circuit Judge, KRAVITCH and REAVLEY*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

---

* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX K — STATUTE INVOLVED

12 USCS § 1972 (1998)

§ 1972. Certain tying arrangements prohibited; correspondent accounts

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement —

(A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company;

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company, of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

Appendix K

The Board may by regulation or order permit such exceptions to the foregoing prohibition and the prohibitions of section 4(f)(9) and 4(h)(2) of the Bank Holding Company Act of 1956 (*12 USCS § 1843*(f)(9), (h)(2)] as it considers will not be contrary to the purposes of this section.

(2)

(A) No bank which maintains a correspondent account in the name of another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(B) No bank shall open a correspondent account at another bank while such bank has outstanding an extension of credit to an executive officer or director of, or other person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, the bank desiring to open the account or to any related interest of such person, unless such extension of credit was made on substantially the same terms, including interest rates and §collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(C) No bank which maintains a correspondent account at another bank shall make an extension of credit to an executive officer or director of, or to any person who directly or indirectly acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, such other bank or to any related interest of such person, unless such extension of credit is made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(D) No bank which has outstanding an extension of credit to an executive officer or director of, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of, another bank or to any related interest of such person shall open a correspondent account at such other bank, unless such extension of credit was made on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features.

(E) For purposes of this paragraph, the term "extension of credit" shall have the meaning prescribed by the Board pursuant to section 22(h) of the Federal Reserve Act (*12 U.S.C. 375b) (12 USCS § 375b]*, and the term "executive officer" shall have the same meaning given it under section 22(g) of the Federal Reserve Act (*12 USCS § 375a]*.

Appendix K

(F) Civil money penalty.

(i) First tier. Any bank which, and any institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act [*12 USCS § 1813*(u)]) with respect to such bank who, violates any provision of this paragraph shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(ii) Second tier. Notwithstanding clause (i), any bank which, and any institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act [*12 USCS § 1813*(u)]) with respect to such bank who —

(I) (aa) commits any violation described in clause (i);

(bb) recklessly engages in an unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty;

(II) which violation, practice, or breach —

(aa) is part of a pattern of misconduct;

(bb) causes or is likely to cause more than a minimal loss to such bank; or

(cc) results in pecuniary gain or other benefit to

such party, shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(iii) Third tier. Notwithstanding clauses (i) and (ii), any bank which, and any institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act [*12 USCS § 1813(u)*]) with respect to such bank who —

(I) knowingly —

(aa) commits any violation described in clause (i);

(bb) engages in any unsafe or unsound practice in conducting the affairs of such bank; or

(cc) breaches any fiduciary duty; and

(II) knowingly or recklessly causes a substantial loss to such bank or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach, shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under clause IV) for each day during which such violation, practice, or breach continues.

(iv) Maximum amounts of penalties for any violation described in clause (iii). The maximum daily amount of any civil penalty which may be assessed pursuant to clause (iii) for any violation, practice, or breach described in such clause is —

(I) in the case of any person other than a bank, an amount to not exceed $ 1,000,000; and

(II) in the case of a bank, an amount not to exceed the lesser of —

(aa) $1,000,000; or

(bb) 1 percent of the total assets of such bank.

(v) Assessment; etc. Any penalty imposed under clause (i), (ii), or (iii) may be assessed and collected —

(I) in the case of a national bank, by the Comptroller of the Currency;

(II) in the case of a State member bank, by the Board; and

(III) in the case of an insured nonmember State bank, by the Federal Deposit Insurance Corporation,

in the manner provided in subparagraphs (E), (F), (G), and (I) of section 8(i)(2) of the Federal Deposit Insurance Act (*12 USCS § 1818*(i)(2)(E)-(G), and (I)] for penalties imposed (under such section) and any such assessment shall be subject to the provisions of such section.

(vi) Hearing. The bank or other person against whom any penalty is assessed under this subparagraph shall be afforded an agency hearing if such bank or person submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 8(h) of the Federal Deposit Insurance Act (*12 USCS § 1818*(h)] shall apply to any proceeding under this subparagraph.

(vii) Disbursement. All penalties collected under authority of this subsection shall be deposited into the Treasury.

(viii) "Violate" defined. For purposes of this paragraph, the term "violate" includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(ix) Regulations. The Comptroller of the Currency, the Board, and the Federal Deposit Insurance Corporation shall prescribe regulations establishing such procedures as may be necessary to carry out this subparagraph.

(G) (i) Each executive officer and each stockholder of record who directly or indirectly owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of an insured bank shall make a written report to the board of directors of such bank for any year during which such executive officer or shareholder has outstanding an extension of credit from a bank which maintains a corresponding account in the name of such bank. Such report shall include the following information:

(1) the maximum amount of indebtedness to the bank maintaining the correspondent account during such year of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder, or which is controlled by such executive officer or stockholder;

(2) the amount of indebtedness to the bank maintaining the §correspondent account outstanding as of a date not more than ten days prior to the date of filing of such report

of (a) such executive officer or stockholder of record, (b) each company controlled by such executive officer or stockholder, or (c) each political or campaign committee the funds or services of which will benefit such executive officer or stockholder;

(3) the range of interest rates charged on such indebtedness of such executive officer or stockholder of record; and

(4) the terms and conditions of such indebtedness of such executive officer or stockholder of record.

(ii) The appropriate Federal banking agencies are authorized to issue rules and regulations, including definitions of terms, to require the reporting and public disclosure of information by any bank or executive officer or principal shareholder thereof concerning any extension of credit by a correspondent bank to the reporting bank's executive officers or principal shareholders, or the related interests of such persons.

(H) For the purpose of this paragraph —

(i) the term "bank" includes a mutual savings bank, a savings bank, and a savings association (as those terms are defined in section 3 of the Federal Deposit Insurance Act [*12 USCS § 1813*];

(ii) the term "related interests of such persons" includes any company controlled by such executive officer, director, or person, or any political or campaign committee the funds or services of which will benefit such executive officer, director, or person or which is controlled by such executive officer, director, or person; and

(iii) the terms "control of a company" and "company" have the same meaning as under section 22(h) of the Federal Reserve Act (*12 U.S.C. 375b*).

(I) Notice under this section after separation from service. The resignation, termination of employment or participation, or separation of an institution-affiliated party (within the meaning of section 3(u) of the Federal Deposit Insurance Act (*12 USCS § 1813*(u)]) with respect to such a bank (including a separation caused by the closing of such a bank) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such bank (whether such date occurs before, on, or after the date of the enactment of this subparagraph [enacted Aug. 9, 1989]).

HISTORY: (Dec. 31, 1970, P.L. 91-607, Title I, § 106(b), 84 Stat. 1766; Nov. 10, 1978, P.L. 95-630, Title VIII, § 801, 92 Stat. 3690; Oct. 15, 1982, P.L. 97-320, Title IV, Part A, § 410(f), Part B, §§ 424(c), (d)(11), (e), 428, 96 Stat. 1520, 1523, 1526; Aug. 9, 1989, P.L. 101-73, Title IX, Subtitle A, H 905(h), 907(i), 103 Stat. 461, 473; Dec. 19, 1991, P.L. 102-242, Title III, Subtitle A, § 306(j), 105 Stat. 2359.)

(As amended Sept. 30, 1996, P.L. 104-208, Div A, Title II, Subtitle B, Ch 1, § 2216(a), 110 Stat. 3009-413.)

No. 97-2035

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC., and UNIVERSAL CONSULTANTS, LTD., CO.,

Petitioners,

—v.—

THE MITSUI TRUST & BANKING CO., LTD. and KAJIMA INTERNATIONAL, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT THE MITSUI TRUST & BANKING CO., LTD. IN OPPOSITION

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July 16, 1998

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Was it lawful under the Bank Holding Company Act, 12 U.S.C. § 1972, for a bank to insist upon performance of conditions that were requested to protect against risk of loss on a loan where the borrower's construction project was millions of dollars over budget, the borrower had no construction contract with any contractor and the borrower sought a last-minute substitution of a new contractor unfamiliar with the project?

2. Was a bank correct, as a matter of Florida state law, in maintaining that a loan commitment had expired when the borrower failed to meet material conditions precedent completely unrelated to the identity of the contractor?

3. Did the Eleventh Circuit correctly award summary judgment dismissing petitioners' claims based on petitioners' sworn statements and signed documents demonstrating that material terms of their financing obligations were not met?

STATEMENT PURSUANT TO RULE 29.6

Respondent The Mitsui Trust & Banking Co., Ltd. ("Mitsui") has no parent company and no nonwholly owned subsidiaries.

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No. 97-2035

In the Supreme Court of the United States

October Term, 1997

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, INC., JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI, INC., and UNIVERSAL CONSULTANTS, LTD., CO.,

Petitioners,

v.

THE MITSUI TRUST & BANKING CO., LTD. and KAJIMA INTERNATIONAL, INC.,

Respondents.

BRIEF OF RESPONDENT THE MITSUI TRUST & BANKING CO., LTD. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This case presents the simple issue of whether a bank that has committed to extend a $27 million non-recourse loan for construction of a hotel can insist on terms and conditions to protect its investment when the borrower requests a last minute substitution of the general contractor. It further presents, in the alternative, the issue of whether the bank is required under state law to perform under a loan commitment when the borrower has failed to meet material conditions precedent completely unrelated to the identity of the contractor.

The Eleventh Circuit reviewed the record under the well-established standards applicable to motions for summary

judgment and reached the unremarkable conclusion that the borrower had no valid claims and the action should be dismissed. In so doing, it did not rest its decision on the question which petitioners now ask this Court to review. Rather, it based its decision on principles of federal law uniformly accepted in every circuit regarding a bank's right to insist on reasonable credit protection and, in the alternative, on an independent ground establishing that petitioners had no valid action as a matter of Florida state contract law. As such, the decision of the Eleventh Circuit is neither in conflict with the decisions of any other circuit, nor does it present a factual record on an issue which would affect the outcome of the case and upon which this Court should address a purported conflict among the circuits. Accordingly, the petition for a writ of *certiorari* should be denied.

STATEMENT OF THE CASE

Counterstatement of Facts

Petitioner Carolyn Properties I ("CP") was a Florida general partnership formed for the purpose of constructing, developing and operating a hotel in Miami Beach. The other petitioners (hereinafter collectively referred to as the "CP Partners") were general partners of CP, each of which was similarly formed for the limited purpose of investing in the project. Respondent The Mitsui Trust & Banking Co., Ltd. ("Mitsui") is a commercial bank organized under the laws of Japan with an office in New York City.

In late 1987, one of the CP Partners, Carolyn Properties Inc. ("CP Inc."), conceived of a project to build

a Japanese-style hotel in Miami and approached a subsidiary of All Nippon Airways. In October 1987, CP Inc. signed an agreement with that subsidiary to operate and manage the hotel under the name "ANA Hotels."

Shortly thereafter, CP Inc. invited several general contractors to provide preliminary budget estimates to construct the hotel. After thoroughly investigating its qualifications, CP Inc. decided to retain respondent Kajima International, Inc. ("KII"). CP Inc. signed a letter of intent with KII dated April 18, 1989, pursuant to which KII was to provide preconstruction services in advance of a possible future construction contract. Among other services, the letter of intent required KII to prepare an itemized guaranteed maximum price contract for the construction of the hotel based on drawings to be prepared by CP Inc.'s architect.

The decision to retain KII was made by CP Inc. independently, without any knowledge of the existence of Mitsui as a potential source of financing and approximately two months before petitioners first contacted Mitsui. Even before their first meeting with Mitsui, CP Inc. was dealing with KII on a daily basis to develop the project.

On June 12, 1989, CP Inc.'s broker submitted a loan application to Mitsui, describing the proposed project and specifying that KII would be the general contractor. Subsequent discussions between CP Inc. and Mitsui with respect to financing terms accepted as an accomplished fact that the borrowers had already selected KII as the general contractor.

On January 11, 1990, Mitsui issued a commitment letter for financing of the project in the amount of $27,000,000 that was signed by each of the CP Partners on January 26, 1990. When they signed the commitment letter, petitioners also signed the joint venture agreement that formed Carolyn Properties I. Each of the CP Partners was represented by experienced counsel.

Each CP Partner was a Florida corporation formed for the specific purpose of participating in this project, and each of them contained very limited assets which, in the aggregate, were substantially less than the amount of the requested loan. The loan was to be non-recourse to CP and its general partners. Therefore, the commitment letter contained several important provisions designed to protect Mitsui against loss and to ensure the integrity of the collateral. These provisions included: (1) a requirement that two of the CP Partners make cash equity contributions totalling $5 million; (2) a requirement that the borrowers provide a $3 million standby letter of credit; (3) a requirement that all architect's plans and specifications be complete before closing; and (4) a requirement that there be no material adverse change in borrower's financial condition.

Finally, to ensure that the hotel would be completed within budget, the commitment letter required that prior to closing KII (the general contractor selected by buyers and specified in their loan application) had to provide a guaranteed maximum price contract ("GMP contract") covering all costs of construction, including furniture,

fixtures and equipment ("FF&E").[1] The commitment letter originally was to expire on July 1, 1990, but was extended in writing four times at CP's request.

As the architects worked on the specific drawings and design of the hotel, the project began to exceed budget. KII notified CP in writing on January 18, 1990, January 23, 1990, June 26, 1990 and August 28, 1990 that the project was exceeding budget by millions of dollars even though the final plans were not yet complete.[2]

---

[1] A GMP contract is a cost-plus contract with a guaranteed maximum limit on the price, *i.e.*, a price which the general contractor guarantees will not be exceeded. If the actual cost is higher than the guaranteed maximum price, the general contractor must bear those costs. Therefore, the general contractor's credibility, experience, knowledge of the project and financial strength are critical to the structure of such a transaction. Under a GMP contract, costs incurred by the general contractor are substantiated on a monthly basis and submitted to the developer and the lender for review and monitoring.

[2] Petitioners' assertions of "fact" regarding KII's estimates illustrate the lengths to which they will go to try to create an issue for this Court. (Petitioners' Brief at 2.) The estimates they purport to compare were not of the same scope: KII's initial $17.8 million figure was only for the building's shell and was based on very preliminary and incomplete drawings, while KII's $26.8 million estimate was based on 85% complete drawings and included all fixtures and equipment. And far from being "abrupt" the $26.8 million estimate came after KII had warned borrowers four times in writing that the budget would be exceeded in light of significant design changes the CP Partners were requesting.

On September 21, 1990, less than two weeks before the commitment letter (as extended) was due to expire, CP fired KII and contacted Turner Construction Company ("Turner") to be its new construction company. Turner, which was new to the project and nowhere near as familiar as KII with its drawings and specifications, provided CP with a "conceptual estimate," not even a firm bid much less a GMP contract. Moreover, contrary to petitioners' suggestion that the scope of this estimate was supposedly the same as that of KII, Turner's "conceptual estimate" did not include costs of furniture, fixtures and equipment, yet was still nearly $3 million over budget.

Mitsui was informed of the proposed last minute substitution of Turner within days. At that time, Mitsui was financing another hotel which Turner was building in Florida and which was experiencing large change orders substantially increasing the cost of construction. Mitsui noted that Turner had only provided an incomplete "conceptual estimate" of cost and had only been reviewing the CP project for two to three weeks. Mitsui was also aware that despite having granted the CP Partners several extensions of its commitment letter, a number of other obligations remained unperformed, including failure to open the required standby letter of credit.

Discovery in this action also revealed that, unknown to Mitsui at the time, CP's joint venture agreement had long since terminated according to its terms and the two principal cash equity investors in the partnership were no longer contractually bound to invest in the project. Moreover, these two CP Partners had, at the same time KII was fired, removed their funds from the Miami escrow account where they were supposed to be held for use in the project. This

was a material adverse change in petitioners' financial condition and violated a term of the commitment letter, although they did not notify Mitsui of it.

Even in these circumstances, which provided many objective reasons for substantial concern, Mitsui agreed to consider CP's proposed new general contractor Turner if the other terms of the commitment letter were met and if an additional letter of credit and a completion guaranty were provided. That proposal was made in writing by letter dated September 26, 1990.

CP did not accept Mitsui's written proposal, never completed the project drawings, never secured a firm bid from any construction contractor for a GMP contract including FF&E, never executed a final and binding GMP construction contract with any general contractor, never provided any letter of credit, and did not bring itself into compliance with several other contractual conditions to financing. Accordingly, on October 29, 1990, Mitsui formally advised CP that in light of its failure to comply with the terms of the commitment letter it had expired.

Proceedings Below

Two years later, on September 14, 1992, petitioners sued Mitsui for breach of contract, fraud, fraudulent conspiracy, promissory estoppel and unjust enrichment. Arguing that the loan commitment letter's specification of KII as general contractor constituted an unlawful "tie" between traditional lending and matters unrelated to the loan (because of alleged financial connections between Mitsui and KII), petitioners claimed that Mitsui had breached section

106 of the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1972. Petitioners also sued KII for breach of contract, fraud, fraudulent conspiracy and tortious interference.

Discovery in the case was massive and continued for more than three years. Over forty thousand pages of documents were produced by Mitsui, KII, petitioners and non-parties. Mitsui answered six sets of interrogatories, forty five depositions were taken extending over 95 days of testimony, and eight expert reports were filed.

On August 23, 1994, the district court granted a motion by Mitsui to dismiss the promissory estoppel, fraud and fraudulent conspiracy claims but denied Mitsui's motion as to the contract, unjust enrichment and BHCA claims.

On February 29, 1996, after further discovery, the district court granted Mitsui's renewed motion for summary judgment dismissing the contract, unjust enrichment and BHCA claims. In its opinion the district court reasoned that because petitioners had independently proposed that KII be the general contractor without any force or coercion from Mitsui, and because Mitsui included KII in the commitment letter at their request, there could be no violation of the BHCA regardless of whether or not Mitsui might seek to hold petitioners to their original agreement. Petitioners' Brief, Appendix D ("App. D") at 26a-28a.

By decision dated January 21, 1998, the United States Court of Appeals for the Eleventh Circuit unanimously affirmed, but on different grounds from those relied upon by the district court. Petitioners' Brief, Appendix A ("App. A"), at 10a.

Noting that notwithstanding petitioners' last minute request, Mitsui had agreed in writing that Turner could be substituted as general contractor, the appellate court reasoned that the real issue for decision was whether Mitsui's agreement to substitute Turner on additional security conditions violated the BHCA. *Id.* at 12a. Citing precedent that conditioning the extension of credit on measures designed to protect a bank's investment was "well within traditional banking practices that do not engender the anti-competitive practices that give rise to a claim under the BHCA," and further noting that under such practices a bank can legitimately re-examine its loan portfolio and reevaluate security risks (*id.* at 13a), the court determined that it was reasonable for Mitsui to consider Turner upon new terms. *Id.* at 14a.

Finally, applying standards applicable to summary judgment motions, the appellate court held:

> The record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII. Turner never submitted a GMP within or outside of budget that would conform to the loan commitment. . . . Ample evidence established that, irrespective of who was selected as the general contractor, Carolyn failed to meet many of the loan conditions and provided Mitsui with valid justification not to further extend the loan commitment. Mitsui did not tie the loan to Carolyn's use of KII.

App. A at 14a (footnotes omitted). In addition, the Eleventh Circuit held that there was another obstacle to Carolyn's

claim because under Florida state law CP failed to meet many of the conditions precedent of the loan unrelated to identity of the contractor.

Significantly, petitioners do not seek review of the Eleventh Circuit's decision on either of the two grounds which formed the basis for that decision. Instead, they would have this Court review the matter based on the reasoning of the district court which the appellate court expressly stated was neither determinative nor the ground for its decision.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit's opinion stands for two wholly unexceptional propositions, neither of which warrants review by this Court:

> (1) it is not tying under 12 U.S.C. § 1972 when a bank, acting within traditional banking practices, conditions its extension of credit on measures "related to and usually provided in connection with a loan" designed to ensure that its investment is protected; and
>
> (2) under Florida contract law, a plaintiff cannot obtain damages for alleged breach of contract where it admits that it did not, and where it could not, perform the conditions precedent to closing.

Because the opinion below turns upon well-established legal principles wholly unrelated to the issue of whether "coercion" is required to establish tying under the Bank

Holding Company Act, and because the appellate court properly applied the standards for grant of summary judgment finding that no jury could reasonably find for plaintiffs on the facts presented, this case does not present "a decision in conflict with the decision of another United States court of appeals" (Supreme Court Rule 10) or any other issue important or sufficiently ripe for review by this Court. Accordingly, the petition for a writ of *certiorari* should be denied.

(1) THE PETITION SHOULD BE DENIED BECAUSE THE ELEVENTH CIRCUIT, CONSISTENT WITH THE LAW AS APPLIED IN EVERY OTHER CIRCUIT, DISMISSED PETITIONERS' CLAIMS FOR FAILURE TO MEET ROUTINE FINANCING CONDITIONS

Petitioners ask this Court to review the decision of the Eleventh Circuit in this case, alleging that the loan commitment unlawfully conditioned the extension of credit to them on the use of KII (a contractor they admittedly voluntarily selected months before seeking financing) and citing a purported conflict among the circuits on the question of whether coercion or force is a necessary element to prove tying under the BHCA.[3] However, although the district

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[3] Compare *Integon Life Ins. v. Browning*, 989 F.2d 1143 (11th Cir. 1993), with *Dibidale of La. v. American Bank & Trust Co.*, 916 F.2d 300, 306 (5th Cir. 1990), *amended*, 941 F.2d 308 (1991), and *S&N Equipment Co. v. Casa Grande Cotton Finance Co.*, 97 F.3d 337, 346 n.18 (9th Cir. 1996) (*dictum*). One may question whether a conflict is actually presented on the *facts* of *this* case and the *facts* presented by the Fifth and Ninth Circuit decisions. In this case, petitioners selected KII independently and

court's opinion rested upon a finding of fact that there was no coercion in the financing agreement's specification of KII, and hence no possible impropriety in enforcing that term, and although this point was *argued* to the Eleventh Circuit, the Eleventh Circuit *did not issue the decision* for which plaintiffs seek review here *on that ground.*[4]

Specifically, although the Eleventh Circuit's opinion summarized the district court decision and in connection with that summary articulated a coercion standard, it *never applied that standard.* Instead, it went on to state that "while we agree with the district court's dismissal of the BHCA claim, we do so *for different reasons.*" App. A at 10a,

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before they contacted Mitsui, which merely accepted petitioners' proposal to use KII in approving the loan application, whereas in both *Dibidale* and *S&N* the bank actually proposed the allegedly tied service which the borrower thereafter adopted and which was included in its written financing proposal.

[4] The district court held that merely insisting on a term of contract proposed by borrowers in a loan application where the contract had been negotiated at arms-length by sophisticated parties who were advised by counsel was not coercion under the BHCA. App. D at 28a. *See also Rayman v. American Charter Fed. Sav. & Loan Ass'n*, 75 F.3d 349 at 356 (8th Cir. 1996) ("Because [borrower] had voluntarily relinquished an absolute right to transfer servicing to an entity he controlled, his decision to accept American Charter as servicer was not the product of the coercion necessary to prove an unlawful tying arrangement."). Mitsui advanced this argument below and does not concede petitioners' argument to the contrary; however, for the reasons set forth in the text, a grant of *certiorari* is inappropriate because the Eleventh Circuit's opinion rests on other grounds.

emphasis added.[5] Thus, the decision entered by the Eleventh Circuit rests on a *different ground* unrelated to the selection of KII or indeed any requirement, coercive or not, that the loan be conditioned on petitioners' use of KII.

The question of whether coercion is required to establish tying under the BHCA is simply not presented by the Eleventh Circuit's opinion.[6] Rather, the Eleventh Circuit's decision rests explicitly on a finding that there was no tying in Mitsui's insistence that if the borrower wanted to propose a new contractor at the last minute, extension of credit under such circumstances would have to include appropriate measures to protect the bank's investment that were "well within traditional banking practices." App. A at 11a *et seq.*

Specifically, as the Eleventh Circuit found in reviewing the record, it was undisputed that Mitsui's loan

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[5] Petitioners' citations to the supposed statements of the Eleventh Circuit that the issue of coercion was determinative in this case are at App. A, at 9a, *before* the Eleventh Circuit articulated its reasons for ruling against petitioners which are found at App. A, at 10a *et seq.*, and, in particular, at 14a ("The record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII").

[6] Indeed, in stating that it would decide the case on different grounds, the Eleventh Circuit observed that "this court has suggested that merely because the borrower purchased or obligated himself to purchase the undesirable product either before or contemporaneously with the loan does not necessarily vitiate a BHCA claim. If the condition was illegal, that condition, regardless of when entered, should not be enforceable." App. A at 11a (footnote omitted).

commitment to petitioners was non-recourse, meaning that Mitsui would be barred from legal action against the borrowers if the security value fell below the amount required to repay the loan. A non-recourse loan involves construction risks and property management risks as the borrower is not responsible to repay the loan except to the extent of the collateral. For this reason, Mitsui required that the general contractor provide a guaranteed maximum price contract. App. A at 11a.

The Eleventh Circuit went on to observe that when Mitsui learned shortly before the expiration of the commitment letter that petitioners had fired KII and proposed the last minute substitution of Turner, it had cause to be apprehensive. The project had dragged on for ten months and the closing had been postponed four times. *Id.* Mitsui nevertheless did not object to continuing the loan without having KII and agreed to substitute Turner if a joint and several completion guaranty from the Japanese investors, a bank letter of credit in the amount of $5 million and a GMP contract from Turner including all FF&E costs conforming to the provisions of the original commitment letter were provided. App. A at 12a-13a.[7]

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[7] Although petitioners argue that a Mitsui banker told them they had to use KII or the loan would be cancelled (a characterization Mitsui would dispute), they concede that in that conversation he also said that Mitsui would review the proposed new contractor, and it is undisputed that within a few days thereafter Mitsui offered in writing to extend the loan provided appropriate financial protections were provided. *See* Petitioners' Brief at 5-6. Under these circumstances, the Eleventh Circuit was correct in disregarding the conversation because, having been superseded by a written letter as to which there could be no

Having reviewed this extensive factual record under the standards applicable to summary judgment, the Eleventh Circuit concluded that Mitsui's re-examination and re-evaluation of the risks presented by a last minute substitution and petitioners' other circumstances were well within traditional banking practices, and that "it clearly was reasonable for Mitsui to consider Turner upon those new terms." App. A at 14a. Reviewing the undisputed record that petitioners completely failed to meet those terms, the Eleventh Circuit went on to hold that "the record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII" and that "irrespective of who was selected as the general contractor, Carolyn failed to meet many of the loan conditions and provided Mitsui with valid justification not to further extend the loan commitment." *Id.*

As a factual and legal matter, the question of whether coercion is required to establish unlawful tying simply is not presented by the Eleventh Circuit's decision in this case. Although the Eleventh Circuit observed that it was nevertheless the fact that there had been no coercion in the original selection of KII (App. A at 11a), the question was academic. Mitsui did not insist on the use of KII and instead offered to allow Carolyn to substitute Turner if reasonable financial conditions were met. *Id.* at 12a. Mitsui advised CP that the loan commitment had expired only after petitioners failed to provide legitimate security assurances requested by Mitsui unrelated to the specific identity of the general contractor and numerous other terms of the financing commitment were not met. *Id.* at 13a-14a.

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dispute, it was not material. *See* App. A at 12a.

While the BHCA prohibits a bank from conditioning its loan on some "additional" credit, property or service to a bank, such a condition must pertain to matters "*other than* those related to, and usually provided in connection with a loan, deposit or trust service." 12 U.S.C. § 1972 (1)(C) (emphasis added). The legislative history of the BHCA explains further that the Act's tying prohibition was not intended to "interfere with the conduct of appropriate traditional banking practices." Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970), reprinted in 3 U.S. CODE CONG. & ADMIN. NEWS 5519 at 5535 (1970).

As the Eleventh Circuit observed in its opinion "[c]ourts have determined that conditioning the extension of credit on measures designed to insure that the bank's investment is protected is well within traditional banking practices that do not engender anti-competitive practices that give rise to a claim under the BHCA." Moreover, it is well-recognized as a traditional banking practice "for banks to constantly re-examine loan portfolios and reevaluate the risks and security needs of [their] loans." App. A at 13a (citation omitted). These unexceptional propositions -- propositions to which the Eleventh Circuit and all other circuits which have addressed the issue (including the Fifth and the Ninth Circuits) agree -- allow banks to require additional financial assurances based on changed circumstances to protect their loans and their overall financial integrity.[8]

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[8] *Parsons Steel, Inc. v. First Alabama Bank N.A.*, 679 F.2d 242, 245 (11th Cir. 1982) (Congress did not intend to interfere with traditional banking practices or to prohibit banks from protecting their investments); *Gulf States Land & Dev. v. Premier Bank N.A.*, 956 F.2d 502, 506-07 (5th Cir. 1992) (requiring debt

The Eleventh Circuit did not decide this case on the question of whether coercion is required to establish tying under the BHCA (App. A at 10a-11a). Rather, it applied a legal standard as to which all the circuits agree -- *to wit*, the right of banks to insist on legitimate security for loan commitments (*id.* at 13a) -- and, applying that standard, found that petitioners had not provided sufficient proof to raise a material issue of fact as to their failure to provide such security or to show that Mitsui had conditioned the loan on petitioners' use of KII (*id.* at 14a). Accordingly, this case does not properly present for review any question as to which there is a conflict and the petition for *certiorari* should be denied.

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restructuring is not an unusual banking practice and no violation); *Bieber v. State Bank of Terry*, 928 F.2d 328, 330 (9th Cir. 1991) ("There is nothing anti-competitive about a bank requiring a debtor to 'put its financial house in order'").

See also Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 897 (3rd Cir. 1981), *cert. denied*, 454 U.S. 893 (1981) ("Imposition of financial controls . . . was directly related to maintaining the security of FPB's substantial investment, and the bank's demand cannot be considered unusual in the face of substantial evidence that it had good reasons to be concerned about the loan"); *Palermo v. First Nat'l Bank & Trust Co.*, 894 F.2d 363, 369 (10th Cir. 1990) ("Section 1972 was not intended to prevent the bank from taking steps to insure adequate security for its loans"); *B.C. Recreational Indus. v. First Nat'l Bank*, 639 F.2d 828, 832 (1st Cir. 1981); *McClain v. South Carolina Nat'l Bank*, 105 F.3d 898, 902 (4th Cir. 1997); *McCoy v. Franklin Sav. Ass'n*, 636 F.2d 172, 175 (7th Cir. 1980); *Rayman v. American Charter Fed. Sav. & Loan Ass'n*, 75 F.3d at 356.

(2) ALTERNATIVELY, THE PETITION SHOULD BE DENIED BECAUSE REGARDLESS OF WHETHER THERE WAS TYING UNDER THE BHCA, PETITIONERS' CLAIM WAS PROPERLY DISMISSED AS A MATTER OF FLORIDA STATE LAW

A second, independent reason for denying a writ of *certiorari* is that this contract case was properly dismissed on state law grounds completely unrelated to the BHCA. Under Florida law, the holder of a promise based upon conditions precedent cannot profit from an anticipatory repudiation of the contract, even if performance of certain conditions precedent is excused, unless he can demonstrate the ability to perform those conditions which remain. App. A at 14a-15a, citing *Hospital Mort. Group v. First Prudential Development Corp.*, 411 So. 2d 181, 183 (Fla. 1982).[9]

Applied to the facts of this case, this Florida legal standard means that petitioners could not enforce the loan commitment contract, even if the provisions regarding the identity of the contractor were invalid or excused, unless they could show that they were able to perform all the other conditions precedent set forth therein. And, as the Eleventh

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[9] Several other Florida cases also articulate this legal proposition. *See, e.g., Cohen v. Champlain Towers North Associates*, 452 So. 2d 989, 991 (Fla. 3d DCA 1984); *Slaughter v. Barnett*, 154 So. 134 (Fla. 1934); *Morely v. Trafalgar Developers of Florida, Ltd.*, 455 So. 2d 391, 394 (Fla. 3d DCA 1984). Moreover, as this Court has noted, "it is our practice to accept a reasonable construction of state law by the court of appeals even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1985).

Circuit recognized, this was an additional and independent obstacle to petitioners' claim. App. A at 14a.

Specifically, as the Eleventh Circuit concluded from a review of the undisputed terms of the loan commitment, the contract between petitioners and Mitsui included many conditions precedent specifying performance obligations by petitioners unrelated to the identity of their proposed contractor, the lack of any one of which would be material to the loan. These included obligations to have a general contractor who had committed to a guaranteed maximum price contract within budget covering not only the shell of the building, but also furniture, fixtures and equipment. *Id.* at 15a.

It was undisputed that petitioners' proffered contractor, Turner, had submitted merely an estimate, not a bid (much less a contract), that the estimate did not cover FF&E, and that it did not include a GMP. App A at 15a-16a. Moreover, the partners of Carolyn Properties had allowed their joint venture agreement to expire, the required standby letter of credit had not been provided, and sums put in escrow by CP's Japanese investors had been withdrawn calling into material question the very existence of the partnership requesting credit of Mitsui, as well as essential capitalization assumptions upon which Mitsui's loan commitment was premised. *Id.*

Thus, as the Eleventh Circuit found, plaintiff Carolyn Properties I, the holder of the loan commitment, "simply was not able to comply with the commitment letter" at any relevant time. *Id.* at 16a-17a. This failure to meet a Florida state law requirement mandated dismissal of petitioners' case, regardless of its BHCA claims. Accordingly, the

petition for *certiorari* should be denied since determination of the question of "coercion" as a requirement under the BHCA is irrelevant to this case.

(3) THERE IS NO BASIS FOR RE-EXAMINING THE LOWER COURTS' REVIEW OF THE FACTUAL RECORD OR FOR CONSIDERING, YET AGAIN, THE STANDARDS FOR SUMMARY JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 56

Perhaps recognizing the futility of their legal arguments, petitioners make a half-hearted attempt to allege that the Eleventh Circuit misapplied the standard for summary judgment. *See* Petitioners' Brief at 17, n.7. The argument is without merit.

The standards applicable to Rule 56 motions are well-established, having been articulated many times over the past twelve years.[10] The Eleventh Circuit's opinion shows that the appellate court was well aware of them as it set out to consider petitioners' claims. *See* App. A at 6a-7a, citing *Celotex Corp. v. Catrett*, *supra*. And there is no indication that the Eleventh Circuit failed to apply these well-recognized standards in holding that "the record does not support a claim that Mitsui rejected Turner on the basis that Carolyn replaced KII," that "irrespective of who was selected as general contractor, Carolyn failed to meet many

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[10] *See, e.g., Eastman Kodak Co. v. Image Technical Serv.*, 504 U.S. 451 (1992); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

of the loan conditions," and (in connection with the alternate state law ground) that "many of the items of the loan agreement which were to be in place 15 days before the closing date had not been completed nor delivered to Mitsui . . . ." App. A at 14a and 15a.

The court of appeals' decision that there could be no reasonable dispute as to the material facts was based on a careful review of all the evidence and, in particular, of admissions contained in petitioners' deposition testimony and operative documents which petitioners wrote squarely admitting that legitimate security assurances requested for the lender's financing commitment were not met. There is no reason for this Court to engage in *de novo* review in a matter where the decisions below are entitled to considerable deference. *See Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-401 (1990).

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 97-2035

In The

Supreme Court of the United States

October Term, 1997

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI INC. and UNIVERSAL CONSULTANTS, LTD., CO.,

Petitioners,

vs.

THE MITSUI TRUST & BANKING CO., LTD. and KAJIMA INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT KAJIMA INTERNATIONAL, INC.

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following are parent companies of respondent, Kajima International, Inc. ("KII"): Kajima Corporation and Kajima U.S.A., Inc. The following is a nonwholly owned subsidiary of respondent KII: HOK/K Industrial, Inc.

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STATEMENT OF THE CASE

Respondent, The Mitsui Trust & Banking Co., Ltd. ("Mitsui"), has filed a brief in opposition to petition for writ of certiorari of petitioners (collectively "CP") setting forth, in detail, the factual background of this case. To avoid repetition, the Court is respectfully referred to Mitsui's brief in opposition and to the opinion of the Eleventh Circuit below as to all factual matters and the procedural history of this case. Respondent KII will confine this brief to the reasons this Court should deny the petition as it relates to KII.[1]

As discussed more fully below, this petition for certiorari should be denied because it lacks the appropriate grounds for this Court's review of the Eleventh Circuit's unpublished decision on CP's state law claims against KII.[2]

A. The petition misrepresents the Eleventh Circuit's holding with regard to KII.

CP's argument as to why this Court should grant review of the decision below as it pertains to KII is contained in a two-sentence footnote. (Pet. at 17). In its entirety, CP's argument reads:

> The Court should grant the petition not only as it applies to Mitsui, but to Kajima as well, because the lower court based its dismissal in part on its finding

---

1. KII does not accept the Statement of the Facts asserted by CP in its petition.

2. CP brought five state common law claims against KII: (1) breach of contract; (2) promissory estoppel; (3) fraudulent inducement; (4) fraudulent conspiracy; and (5) tortious interference, all of which were dismissed on summary judgment by the district court.

> of no [Bank Holding Company Act] violation by Mitsui . . . If this Court concludes the lower court erred in interpreting the [Bank Holding Company Act] — as Carolyn asserts in this petition — that ruling would vitiate the lower court's granting of summary judgment for Kajima.

(Pet. at 17, n. 8).

However, the Eleventh Circuit did *not* base its decision concerning the claims against KII on any finding as to the Bank Holding Company Act ("BHCA"). It simply determined, after reviewing the voluminous record in this case, that there was insufficient evidence to support an issue with respect to CP's breach of contract and tortious interference claims against KII under Florida law. Specifically, the Eleventh Circuit held, with regard to CP's breach of contract claim, that:

> [t]he evidence in the record does not support an issue that KII's actions affected Carolyn's ability to build the proposed hotel. KII played no role in selecting Mitsui as financier of this project nor did KII cause the Japanese investors to terminate the escrow agreement or cause Carolyn to fail to obtain a letter of credit. Because we find that Carolyn's inability to close the loan rests solely on Carolyn's inability to meet several of the conditions precedent not involving KII or Mitsui, Carolyn's breach of contract claim was properly dismissed by the district court.

(Pet. App. A at 17a). The court further held that CP's claim for tortious interference against KII was "without merit" because the record established that "Mitsui provided Carolyn with an opportunity to use Turner if Carolyn met the conditions set forth in the September 26, 1990 letter." (Pet. App. A at 14a). The court also found that,

> irrespective of who was selected as the general contractor, Carolyn failed to meet many of the loan conditions and provided Mitsui with valid justification not to further extend the loan commitment.

(*Id.*).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO SEEK REVIEW OF ANY ISSUE RELATING TO KII.

Supreme Court Rule 14.1(a) mandates that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." The questions presented by CP for review by this Court pertain solely to the BHCA. (Pet. at i). CP's claims against KII do not involve a violation of the BHCA, but instead are based solely on violations of Florida's common law. (Pet. at 3). Therefore, the questions presented to this Court do not, in any conceivable way, implicate the decision below as it relates to KII. Resolution of these questions would have no impact whatsoever on the Eleventh Circuit's decision that the evidence failed to support an issue concerning CP's state law claims against KII.[3] Thus, the petition does not properly seek review of the Eleventh Circuit's decision with regard to KII.[4]

---

3. *Butner v. United States*, 440 U.S. 48, 57-58, 99 S. Ct. 914, 919 (1979) (refusing to consider state law issue, on ground that federal judges who deal regularly with questions of state law in their respective districts and circuits were in better position to determine how local courts would dispose of such issues).

4. *See Izumi Seimitsu v. U.S. Philips Corp., et. al.*, 510 U.S. 29, 34, 114 S. Ct. 425, 428 (1993) (dismissing writ where Court, in order to reach the merits, would have to address a question that was not presented in the petition nor fairly included in the question that was presented).

II.

THE PETITION DOES NOT MERIT REVIEW BY THIS COURT.

CP has not satisfied the requirements for invoking this Court's certiorari review. Supreme Court Rule 10 provides that a writ of certiorari will be granted "only for compelling reasons." Examples of "reasons" which merit a grant of certiorari include: (1) conflicts between decisions of the United States courts of appeal; (2) decisions rendered by a United States court of appeal on an important question of federal law that has not been, but should be, settled by this Court; and (3) conflicts between the decision of a United States court of appeal and relevant decisions of this Court. Sup. Ct. R. 10(a), (c). The Eleventh Circuit's unpublished decision holding that CP failed to present evidence supporting any claim against KII under state law is not in conflict with any decision of any other circuit or this Court. Nor does the decision present an important question of federal law.

Without presenting a question concerning KII, CP would apparently have this Court engage in the academic exercise of reconsidering the factual analysis painstakingly performed by the Eleventh Circuit. Supreme Court Rule 10, however, notes that "[a] petition for certiorari is 'rarely granted' based on the assertion of erroneous factual findings or the misapplication of a properly stated rule of law." Accordingly, the Eleventh Circuit's determination that CP failed to establish sufficient evidence to support claims for breach of contract and tortious interference under Florida law simply does not merit review by this Court.[5]

---

5. *N.L.R.B. v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 177 n. 8, 102 S. Ct. 216, 222 n. 8 (1981) (dismissing writ which presented primarily a question of fact, "which does not merit Court review."); *Rudolph v. United States*, 370 U.S. 269, 270, 82 S. Ct. 1277, 1278 (1962) (dismissing

CONCLUSION

For the reasons set forth above, and for those given in respondent Mitsui's brief in opposition, the petition should be denied.

Respectfully submitted,

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(Cont'd)

writ as improvidently granted where determination depended upon factual issues "and review of facts would be of no importance save to litigants themselves"); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924).

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No. 97-2035

In The

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October Term, 1997

CAROLYN PROPERTIES I, Florida general partnership; CAROLYN PROPERTIES, INC., a Florida corporation; JOIVECA CORPORATION, a Florida corporation; JLP HOLDINGS, INC., a Florida corporation; TK HOLDINGS, INC., a Florida corporation; HHC MIAMI, INC., a Florida corporation; and UNIVERSAL CONSULTANTS, LTD., CO., a Florida corporation,

Petitioners,

vs.

THE MITSUI TRUST & BANKING CO., LTD., a foreign corporation and KAJIMA INTERNATIONAL, INC., a foreign corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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FURTHER REASONS FOR GRANTING THE WRIT

Petitioners respectfully reply in support of their petition. Pursuant to Supreme Court Rule 15(b), Petitioners limit this reply to response to new points raised by the opposition briefs of respondent The Mitsui Trust & Banking Co., Ltd., ("Mitsui") and Kajima International, Inc. ("Kajima").

A. The Opinion Below Presents a Direct Conflict Between the Circuits on the Basic Elements of a BHCA Claim

Mitsui questions in a footnote whether a conflict is "actually" presented between the Eleventh Circuit's decision here and the Fifth Circuit's decision in *Dibidale of Louisiana v. American Bank Trust Co.*, 916 F.2d 300, 306 (5th Cir. 1990), *amended*, 941 F.2d 308 (5th Cir. 1991) (Mitsui brief at 11 n.3).

The Eleventh Circuit and the Fifth Circuit do directly conflict over whether the BHCA requires proof by a borrower of "force" or "coercion." The Eleventh Circuit requires a borrower to prove "force" or "coercion" to prevail under the BHCA; the Fifth Circuit does not. *See Integon Life Insur. Corp. v. Browning*, 989 F.2d 1143, 1151 n.20 (11th Cir. 1993) (followed by the Eleventh Circuit in its opinion here and noting its conflict with *Dibidale*).

This conflict is accentuated because the Fifth Circuit and the Eleventh Circuit have reached different conclusions on nearly identical fact patterns. As here, the borrower in *Dibidale* sued its lender because the bank required that the borrower use a specific general contractor to build a project (the bank's affiliate held that contractor's accounts receivable). In *Dibidale*, the loan commitment itself expressly recited that the borrower "was not coerced or forced" to select the general contractor. Further, the borrower admitted that it was "comfortable" with

the contractor and that it "did not protest" its selection. 916 F.2d at 303, 307. Yet the Fifth Circuit still concluded that genuine issues of material fact existed whether the bank violated the BHCA. Critical to this holding was the Fifth Circuit's legal conclusion that "force" or "coercion" are **not** elements of a BHCA claim.

The facts here are far more compelling. In *Dibidale*, the bank was only "strongly urging" the use of the contractor. 916 F.2d at 307. Here, Mitsui admitted that Kajima was a "requirement" of the loan.

Mitsui admits in its brief that the Eleventh Circuit concluded that Carolyn had to prove that "Mitsui had conditioned the loan on [Carolyn's] use of KII." (Mitsui brief at 17). That is precisely Carolyn's point. Mitsui's own officers admitted under oath that Mitsui *did* in fact require that Kajima serve as the contractor. Mitsui cannot escape its own officers' — and its own brief's — admissions. Mitsui essentially has confessed error.

B. The Opinion Below Squarely Held That Carolyn Had to Prove That Mitsui Used "Force" or "Coercion"

Mitsui argues that the Eleventh Circuit did not hold that "force" or "coercion" were required. Mitsui asserts that "[t]he question of whether coercion is required to establish tying under the BHCA is simply not presented by the Eleventh Circuit's opinion." (Mitsui brief at 13). Mitsui makes this argument throughout its brief. (*See* Mitsui's brief at 10, 12, 13, 15, and 17). Mitsui's argument is patently incorrect.

The Eleventh Circuit ***repeatedly*** did hold that, to prevail under its Bank Holding Company Act ("BHCA") claim, Carolyn was required to prove that Mitsui "forced" or "coerced" it to

use Kajima as the contractor. The Eleventh Circuit stated in its opinion:

> Therefore, in order to succeed on its BHCA claim, Carolyn must prove that Mitsui ***forced*** or ***coerced*** Carolyn into using KII as the general contractor as a condition to obtaining the loan.

App. at 9(a) (Emphasis added).

Mitsui therefore has no grounds whatever to assert that the opinion below omits the question whether the BHCA contains elements of "force" and "coercion." That is the stated foundation of the Eleventh Circuit's opinion. Were "force" or "coercion" not required under the BHCA, the Eleventh Circuit would have had to engage in an entirely different analysis — whether Kajima was a "condition" or "requirement" of the loan. But Mitsui has already admitted that the answer to that question is Yes. The determination of the proper elements of a BHCA claim becomes dispositive here.

C. The Issue Presented is Solely One of Law — The Relevant Facts Are Undisputed

Mitsui presents two alternative arguments. First, it argues that Carolyn's claim was properly dismissed as a matter of Florida state law and, second, that there is no need to re-examine the factual record.

Mitsui's first argument fails: state law, of course, can never "legalize" a violation of a federal statute. Further, Mitsui's argument ignores Supreme Court precedent holding that an antitrust violation need not be the sole cause of plaintiff's injuries, only a material cause. (*See* Petitioners' petition at 17).

With respect to Mitsui's other argument, there is no need to re-examine the factual record. The issue presented is whether the Eleventh Circuit correctly interpreted the BHCA by requiring Carolyn to prove "force" or "coercion" — elements not contained on the face of the statute. Mitsui's officers have admitted under oath that Kajima was a "requirement" under the loan commitment. Thus, the record is crystallized, and the only issue is a legal one.

D. Respondent Kajima's Summary Judgment Should Be Reviewed on Certiorari Because the BHCA Ruling Served as a Premise to Kajima's Dismissal

Kajima claims that no grounds for certiorari exist with respect to its summary judgment. But at least part of the Eleventh Circuit's decision below hinges on that court's erroneous finding that the bank committed no BHCA violation. The court stated that Kajima could not be held liable because Carolyn could not fulfill the terms of the loan. However, were this Court to conclude that Mitsui's BHCA violation even in part impeded Carolyn's ability to close, then the premise underlying the Kajima dismissal is flawed.

CONCLUSION

The virtually unchecked current expansion of banks into the securities field and many other endeavors, renders clarification of the BHCA's anti-tying provision more critical than ever before. The very fabric of American financial integrity has become imperiled. The Court should grant the petition for writ of certiorari to resolve the conflict between circuit courts on the basis elements of a BHCA claim.[1]

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1. Mitsui acknowledges that it "advanced below" the argument that it could not have used "force" and "coercion" because Carolyn initially proposed Kajima. (Mitsui brief at 12 n.4). Mitsui's argument fails as a matter of law. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138, 142 S. Ct. 1981 (1968) *overruled in part on other grounds* by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984) (even a party which "solemnly subscribed" to an agreement still has a valid antitrust claim as of the day the other party "forces it to comply unwillingly" with the tie); *Tidmore Oil Co. v. BP Oil Co.*, 932 F.2d 1384, 1388 (11th Cir. 1991) (under antitrust laws, "an agreement may be challenged even by one of the parties who has acquiesced in the unlawful agreement").

Respectfully submitted,

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